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Reply for U.S. at page 104.

No. 1045.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD COMPANY;
CENTRAL TRUST COMPANY OF NEW YORK;
D. O. MILLS AND HOMER S. KING, AS TRUSTEES,
Defendants and Appellants,

VS.

THE UNITED STATES,
Complainant and Appellee.

Appellants' Brief.

WM. SINGER, JR.,
Attorney for Defendants.

WM. F. HERRIN,
Counsel for the Defendants.

FILED THIS..... DAY OF....., A. D. 1904.

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Clerk.

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Appellants' Brief.

This is an appeal by the above-named defendants, from so much of the decree as injuriously affects them, entered in suit No. 979 on the docket of the United States Circuit Court for the Southern District of California, brought in behalf of the United States against these defendants and other persons who have not appealed.

The suit was brought to cancel patents issued to the Southern Pacific Railroad Company, for lands described

in the bill, in so far as such lands were not held by purchasers from the said Company, whose title stood confirmed by the Act of Congress of March 2nd, 1896 (29 Stats. 42); and to recover $1.25 per acre from the said Company for all such lands sold by it to purchasers whose titles stood confirmed by that Act.

The case was dismissed as to certain of the lands (Tr., Vol. 1, p. 106).

The decree finds **(a)** that all the remaining lands of the bill were *sub judice* (because of the "Jurupa" Mexican Grant claim) at the time the Southern Pacific grant (under which the land patents were issued) took effect; **(b)** cancels the Southern Pacific Railroad Company's patents for all lands in suit not sold by it otherwise than by trust deeds to the other appellants herein; **(c)** confirms the title of all purchasers from the Southern Pacific (other than these appellants) of lands in suit; and **(d)** gives judgment against the Southern Pacific Railroad Company at the rate of $1.25 per acre, with interest, for all lands in suit sold by it to persons whose title is declared confirmed by the decree.

It will be observed that the Southern Pacific received considerably less than $1.25 per acre from Michael Craig (Tr. Vol. 1, p. 100), whose title is confirmed and charged to the Southern Pacific at $1.25 per acre (Tr., Vol. 1, p. 118).

This appeal is from all of the decree other than such parts thereof as confirms the title purchased from these appellants. (See Assignment of Errors, Tr., Vol. II, p. 627).

POINTS OF CONTENTION.

This appeal is based on the following contentions:

I. None of the lands in suit were *sub judice* at the time the Southern Pacific land grant attached; hence the Circuit Court erred in adjudging cancellation of the patents therefor.

II. The Act of March 2nd 1896, gratuitously and unconditionally confirmed the title conveyed by the patents in suit, to all lands at that time held by purchasers in good faith from the Southern Pacific Railroad Company; from which it follows that those patents could not be canceled in this suit, whether true or untrue that they were erroneously issued.

III. Were it true that the patents complained of were erroneously issued, still complainant is not entitled to recover any price for lands in suit sold by these appellants, because **(a)** by Act of March 2nd 1896, Congress gratuitously and unconditionally confirmed the title thus sold and conveyed; **(b)** the demand for such payment is *in assumpsit,* at law; and **(c)** the Southern Pacific Railroad Company has not received, these lands included, the quantity of land granted by its granting Act.

ARGUMENT.

I.

None of the lands in suit were sub judice at the time the Southern Pacific land grant attached; hence the Circuit Court erred in adjudging cancellation of the patents therefor.

1st. The lands in suit are odd-numbered sections within the primary limits of the grant made to the Southern Pacific Railroad Company by the Act of Congress

approved on March 3rd 1871 (16 Stats. 573); and it may be fairly stated as admitted that all the lands in suit were granted by that Act, unless they were within claimed limits of the Mexican Grant "Jurupa" at date of that grant, or date of definite location (1874) of that Company's railroad.

The bill alleges that all lands in suit are within limits of the Jurupa Grant as made by Mexico to Bandini (Tr., Vol. 1, p. 8); but that the patent issued in confirmation of that grant did not include any of those lands (Tr., Vol. 1, p. 9). The answer of these appellants denies that the Jurupa Grant claim ever included any of the lands in suit.

The evidence shows, and it is in nowise contradicted or disputed: That on September 25th 1852, Juan Bandini filed with the United States Commissioners for the adjudication and Settlement of California Land Claims, his petition praying that they " confirm in him his present claim," based on "A copy of the original grant" filed with the petition (Tr., Vol. 1, pp. 158, 159); that by decree filed on October 17th 1854, the said Commissioners confirmed the claim of Bandini, as presented and prayed (Tr., Vol. 1, p. 160); that on April 5th 1861, the United States District Court for the Southern District of California, on appeal by the United States from the Commissioners' decree, affirmed the decree appealed from (Tr., Vol. 1, p. 163); that on March 2nd 1875, pursuant to Mandate from the United States Supreme Court (Tr., Vol. 2, p. 507), on appeal by the United States from the said District Court decree of confirmation, it was by the said District Court ordered " that claimant proceed under the Decree of Con-

firmation heretofore entered herein as under Final Decree." (Tr. Vol. 2, p. 510); and on May 23rd 1879, the proper officers of the United States patented the "Jurupa" to Abel Stearns (successor in interest to Bandini), as surveyed in accordance with such final decree. (Tr., Vol. II. pp. 392 to 417).

No controversy, or dispute, as to claimed limits, or confirmed boundaries, was presented to the United States Commissioners, or to the District Court. To the contrary, the several decrees confirm, and the patent conveys, the "Jurupa" *as claimed and prayed,* and, admittedly, the lands in suit here are not within the calls of the patent nor limits of the approved survey. In other words, the lands patented as the "Jurupa" *are the identical lands claimed, prayed for, and confirmed as the "Jurupa";* hence to say that the lands in suit are not embraced by the patent, is to say that they are not and never were within the claimed limits of the "Jurupa".

2nd. It is true that in the case of the S. P. R. R. Co. vs. Brown, 75 Fed. Rep. 85-90, this Court held that certain lands in that suit were excepted from the Company's grant because within claimed limits of the "Jurupa" at date of railroad definite location—notwithstanding such lands were not within the patented limits of the "Jurupa". In that case, however, the decision was based largely on parol testimony to the effect that Abel Stearns ("Jurupa" patentee) claimed to broader limits than those disclosed by Bandini's *record claim.* After saying, on page 88 (75 Fed. Rep.) that "The question is not whether the lands were embraced in the Jurupa grant at the time the grant was made to the railroad

company, but whether they were at that time claimed to be within its boundaries.", this Court proceeded to discuss and decide that question on the parol testimony before it, as to what Abel Stearns had said to people about the extent, or breadth, of his claim. In this case at bar no testimony was introduced as to oral assertions, or claims, of the " Jurupa " claimants.

In **Tarpey vs. Madsen, 178 U. S. 215,** Madsen was permitted to prove by parol testimony that Olney, who filed pre-emption claim for the land in May 1869, alleging settlement thereon in April 1869, had in fact settled on the land prior to definite location of the railroad (October 20th 1868); Madsen claiming right to himself enter the land as public land, because excepted from the railroad grant by the occupancy of Olney at date of definite location, who thereafter filed his pre-emption claim in time. But the Court, holding that the *record claim* of Olney as to the date of his settlement must control, and that the " claim " of Olney could not be shown by parol, said (p. 228):

> " Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the rail-

> road company may not question the validity or propriety of the entryman's claim of record, its right ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract."

Here the "claim" of Bandini, as there the claim of Olney, is as made by the *claimant's record* thereof—hence it is sufficient to say that, admittedly, the lands in the suit at bar are not within the limits of the "Jurupa" as claimed by Bandini in the record made by him; because, as said in Tarpey vs. Madsen, while "the railroad company may not question the validity or propriety of the entryman's *claim of record*, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony."

3rd. In the case at bar no oral testimony was offered to show that Bandini, or others, ever claimed broader boundaries for the "Jurupa" than those described in the claim he filed with the United States Commissioners—nor is it disputed that the boundaries of the "Jurupa" as confirmed and patented are identical with the boundaries of the "Jurupa" as described by Bandini in the claim he filed and prayed confirmation of. The complainant's contention that title to the lands in suit here did not pass under the Southern Pacific grant, is based solely on the theory that the Reynolds map made in 1869 and approved by the Surveyor General for California in 1872, constituted a public record of claimed limits of the

"Jurupa" from the date of the Surveyor General's approval (1872) until rejected (in 1876) by the Commissioner of the General Land Office—intermediate which dates (1874) the Southern Pacific grant was definitely located. The Reynolds map enlarged the "Jurupa" beyond the boundaries given in Bandini's claim as filed, and beyond the boundaries fixed by the confirmation decree—in that way erroneously embracing these lands in suit. We say that the *status* of the lands in suit was at no time in anywise affected by the Reynolds map—because that map was at no time a public record, or other lawful record; for that:

A. The Reynolds map was made before the "Jurupa" claim was "*finally confirmed*"—hence made prematurely, and without lawful authority.

B. That map did not "*follow the decree of confirmation*" as to boundaries—hence was void and impotent; and

C. The Surveyor General had no lawful authority to approve the Reynolds map—hence his approval thereof was wholly without legal significance, or consequence.

4th. The "Jurupa", unlike Mexican grant claims generally, was not accompanied by any diseño, or map; nor did any withdrawal of lands made pending settlement of the "Jurupa" claim include these lands in suit. There having been no executive withdrawal, it follows that this land retained its status as "public land" until withdrawn, or reserved, from the public domain by the direction of Congress, or the operation of law.

Prior to the passage of the Act of July 1st 1864, in force when the Reynolds' survey of the "Jurupa" was

made, the powers and duties of the Surveyor General, in respect of the surveying of Mexican grant claims, were defined by Section 13 of the Act approved March 3rd 1851, entitled "An Act to ascertain and settle private Land Claims in the State of California" (9 U. S. Stats. 633). So far as it need be considered here, Section 13 of that Act reads as follows:

> "For all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat of the survey of said land duly certified and approved by the Surveyor General of California, whose duty it shall be to cause all private claims which shall be *finally confirmed* to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said Surveyor General shall have the same power and authority as are conferred on the register of the land office and receiver of public moneys of Louisiana by the sixth section of the Act, 'to create the office of surveyor of the public lands for the State of Louisiana' approved third March, one thousand eight hundred and thirty-one."

The sense of which is, in so far as it relates to the Surveyor General's duties, that he was authorized and required to accurately survey the claims mentioned, and to plat, certify and approve such survey; and upon the presentation of such approved plat, with the certificate of confirmation mentioned, the General Land Office was required to issue a patent for the claim. But, it will be observed, until the claim was "*finally confirmed*," the Surveyor General had no authority to act at all; as the Act confined his authority of survey and approval to "claims finally confirmed."

No proceedings were undertaken while Section 13 of the Act of 1851 was in force. The first survey to be considered was that made by Reynolds, under authority of the Surveyor General's letter of January 14th 1869; and at that time the Act of July 1st 1864 (13 U. S. Stats. 332) was in force. This Act took away from the Surveyor General the authority conferred on him by the Act of 1851 to approve surveys of Mexican grant claims, and vested it in the Commissioner of the General Land Office. Sections 1 and 2 of this Act of 1864 relate to surveys and plats theretofore made; and Sections 6 and 7 prescribe the procedure for all claims not then surveyed. Omitting, for easier understanding, the parts of no concern here, and Sections 6 and 7 are as follows:

> " Section 6. And be it further enacted, That it shall be the duty of the Surveyor General of California to cause all the private land claims *finally confirmed* to be accurately surveyed and plats thereof to be made, whenever requested by the claimants. * * * * Whenever the survey and plat requested shall have been completed and forwarded to the Commissioner of the general land office, as required by this Act, the district court may direct the application of the money" etc.
>
> " Sec. 7. And be it further enacted: That it shall be the duty of the Surveyor General of California, in making surveys of the private land claims *finally confirmed, to follow the decree of confirmation* as closely as practicable, whenever such decree designates the specific boundaries of the claim. * * * And it shall be the duty of the Commissioner of the general land office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him."

The procedure prescribed by these sections for the survey of claims, like that provided by the Act of 1851,

related to "*finally confirmed*" claims; and until a claim was finally confirmed, the Surveyor General had no lawful authority to survey it at all—and any survey made prior to such final confirmation was a mere personal act, without legal significance. The claim, after final confirmation, was to be surveyed by the Surveyor-General in accordance with the decree—not otherwise, and, admittedly, the Reynolds survey was not in accordance with any decree. After survey the Surveyor General was required to send a plat thereof to the Commissioner; and it was specifically provided that the Commissioner "should require a substantial compliance" by the Surveyor-General, with the provisions of Section 7, requiring the survey to be made in accordance with the final decree. And, as before said, the authority to approve the survey, conferred on the Surveyor-General by the Act of 1851, was taken away from him and vested in the Commissioner by Section 7 of the Act of 1864; hence the Surveyor-General's approval carried no more legal significance than would the approval thereof by a Post-master.

The Surveyor-General had no lawful authority to approve the survey at all—whether correctly or incorrectly made. His duty was to forward the survey to the Commissioner, whose duty it was to approve or reject it (Secs. 6 and 7, Act 1864). On May 13th 1876, when the plat reached him, the Commissioner disapproved and rejected it (Tr., Vol. 1, p. 336), and on May 23rd 1879, approved and patented the Minto survey—made in November 1878; and such was the uniform ruling of the Interior Department until reversed on authority of this Court's decision hereinbefore referred to (75 Fed. Rep.

85). In the case of **S. P. R. R. Co. vs. Mackel, 11 L. D. 493,** Secretary Noble said:

> " The land reserved by the Jurupa grant was that included within the boundaries of the claim as confirmed, i. e., within the boundaries shown by the record of the juridical possession. These boundaries were determined on the ground by the survey of 1878 —hence the only land reserved by said private grant was that within that survey. To render a survey made under the Act of July 1, 1864, effective, it was necessary that it should be approved by the Commissioner of the General Land Office. The survey of this grant made in 1869, never received the approval of your (Commissioner's) office or of this department—and in fact had not, at the date the grant to the railroad company took effect, been approved by the Surveyor-General. Such a survey was not effective to except these tracts in controversy from the operation of the latter grant."

Again, in **Duncanson vs. S. P. R. R. Co., 12 L. D. 666,** Secretary Chandler, after discussing the doctrines of Newhall vs. Sanger (92 U. S. 761), Doolan vs. Carr (125 U. S. 613), and U. S. vs. McLaughlin (127 U. S. 428), said:

> " The only question which remains to be answered is this: Was the tract claimed by Duncanson within the specified or intended limits of the Jurupa grant? A negative answer would seem to be sufficient, based upon the fact that the survey, upon which a patent issued, excluded said tract. If it should be held that an erroneous survey of the boundaries of a private grant which embraced a tract of land a few rods outside the actual boundaries, could reserve the land from other appropriation, it must be held, that a like survey which embraced land a few miles outside the boundaries would also reserve said land in like manner, a doctrine which is emphatically denied by the Court in the cases herein cited. The survey

made in 1869 under the provisions of the Act of July 1, 1864, did not operate as a segregation of the land, for in order, to become thus operative, it was necessary that it receive the approval of the Commissioner of the General Land Office, and had it been approved, patent must have issued. Said survey, however, was not approved, and the segregation was not made."

The Reynolds map did not show, nor did it purport to show, boundaries to which Bandini, or his successor Abel Stearns, or any other person for that matter, claimed the "Jurupa" to extend; and in his letter of May 13th 1876, rejecting that map, the Commissioner, speaking of Reynolds and his map, said, he "has, in several instances, in fixing his monuments and directing his lines, discarded the plain requirements of the decree." (Tr. Vol. 1, p. 331). For this reason the Reynolds map was rejected—and the rejection was purely *ex parte,* for no person interested in the "Jurupa" claimed, before the United States Commissioners, in the District Court, or in the Land Department, that the lands of this suit were within limits of the "Jurupa."

Reynolds made an unauthorized survey, which did not appear nor purport to define the boundaries of the "Jurupa" in accordance with any decree, nor according to the claim of any person; and the Land Department, acting within itself, without suggestion from parties in interest, rejected the Reynolds map and caused a new, and correct, survey and map to be made by Minto. The boundaries of the "Jurupa" were identical at all times, and never did embrace this land in suit; nor did any owner in the "Jurupa" ever claim this land to be within the limits thereof—in so far as shown in this case.

In other words, Bandini asked for what he wanted, defined the boundaries of his claim in his petition, no person disputed or denied the boundaries thus defined, the decrees confirmed his claim to the boundaries defined —and the patent follows the final decree; so that Bandini got what he asked for, and all he asked for or at any time claimed.

II.

The Act of March 2nd 1896, gratuitously and unconditionally confirmed the title conveyed by the patents in suit, to all lands at that time held by purchasers in good faith from the Southern Pacific Railroad Company; from which it follows that those patents could not be cancelled in this suit, whether true or untrue that they were erroneously issued.

1st. While several of the tracts in suit were not sold by the Southern Pacific Railroad Company to other purchasers, all lands in suit are covered by the trust deeds given by that Company to its co-appellants herein.

The Act of March 3rd 1887 (24 U. S. Stats. 556) contains a proviso "That a mortgage or pledge of said lands by the Company shall not be considered as a sale for the purpose of this Act;" thus excluding mortgagees, and land holders under deeds of trust given to secure the payment of debts, from the class of persons to whom the benefits of that Act are extended. No such proviso, however, is to be found in the Act of March 2nd 1896 (29 U. S. Stats. 42)—the first section of which provides, without restriction or exclusion as to or of persons, that

> "No patent to any land held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

In **United States vs. Winona, etc., 165 U. S. 481,** it was held that

> "The Act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his land should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser' has, nevertheless, purchased in good faith from the railroad company."

The title confirmed is the identical title sought to be conveyed by the patent to the railroad company; and the Act of 1896 takes away the power of courts to cancel any patent for such land. The grant considered in the Winona case was made to the State of Minnesota, and not directly to the railroad company; and it provided that the lands should be conveyed by certification, instead of by patent. On page 477 of the opinion (165 U. S.), interpreting the provisions above quoted from the Act of March 2nd 1896, it is said:

> "We are of the opinion that Congress intended by the sentence we have quoted from the Act of 1896, to confirm the title which in this case passed by certification to the State. * * * Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it."

We submit that the bond-holders under the Trust Deeds are *bona fide* purchasers of all patented lands; and, that, therefore, the title sought to be conveyed by those patents is confirmed, and the court's power to cancel those patents cut off, by the Act of 1896. Both Trust Deeds are in the nature of common law mortgages, conveying the legal estate with a clause of defeasance. Each provides that

the lands may be sold from time to time, and the full amount received therefor applied to the payment of the bonds secured; and in case of default the trustees are to dispose of the unsold lands, and apply the proceeds to payment of the bonds. It is settled law that such instruments convey legal title—and are not mortgages. **(More v. Calkins, 95 Cal. 436,** and cases cited. See, also, respondents' authorities in **Grant v. Burr, 54 Cal. 299.)**

If these views are correct, then no patent for any land in suit can be canceled, as all the lands are covered by the trust deeds. (Tr., Vol. 2, pp. 511, 560).

2nd. As before said, the first section of the Act of March 2nd 1896, (29 Stats. 42) provides that

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This decision in the Winona case is cited with approval and followed in **United States v. S. P. R. R. Co., 184 U. S. 49.**

Persons who bought under credit contracts, paying part only of the price, are protected by section 3 of the Act of March 2nd 1896, which speaks of "*bona fide* purchasers * * * by deed or contract or otherwise." **(United States v. S. P. R. R. Co., 117 Fed. Rep. 544.)**

Congressional Acts granting lands to aid in the construction of railroads, *are laws* as well as conveyances; hence, prior to passage of the Act of March 3rd 1887, good faith purchasers, for full value, of the lands patented under such land grants, could not defend against cancellation of patents erroneously issued, at suit of the United States—*because of the conclusive presumption that they knew the law,* and bought with notice. Given a patent erroneously issued to a railroad company, and the United States could procure cancellation thereof, and full recovery of its own, without inquiry as to whether the railroad company had or had not attempted to sell or convey such lands—as the law was prior to the Act of March 3rd 1887. **(Pom. Eq. Jur. 745; United States v. Winona etc.,**

165 U.S. 463, 483; Simmons Cr. Coal Co. v. Doran, 142 U. S. 417; Nesbit v. Ind. Dist., 144 U. S. 610; Lytle v. Lansing, 147 U. S. 59; Sutliff v. Lake Co. 147 U. S. 230) In other words, prior to March 3rd 1887, questions or obligations arising out of attempted sales by railroad companies of lands erroneously patented to them, were contractual matters between vendor and vendee, respecting which the United States had neither interest nor concern.

Mindful of this right of full recovery, by cancellation of erroneous patents, where railroad companies had attempted to sell or convey the lands thereof, Congress, in Section 2 of the Act of 1887, called on the Secretary of Interior to report such erroneous patents to the Attorney-General, and declared that "it shall thereupon be the "duty of the Attorney-General to commence and prose-"cute in the proper courts the necessary proceedings to "cancel all patents for such lands and to restore the "title thereof to the United States." Upon cancellation of the erroneous patents, and restoration of title to the United States, the lands would resume their original *status* as public lands, subject to disposal by Congress; and, of course, cancellation of such patents and restoration of title in the United States, placed the United States in *statu quo*—for which reason, if for no other, the United States could not, after recovery of title, also recover from the railroad company the cash value of, or money received from its vendee in the attempted sale and purchase of, the restored land. But Section 4 of the Act of 1887 undertakes to provide for recovery of the land from the railroad companies, and, in addition thereto,

recovery from the same company of one and one-quarter dollars per acre for the lands thus taken from it; in other words, *to recover the lands and also recover the value of the lands.*

This section (4) provides that, after cancellation of the railroad company's patents, and full recovery of the lands, the lands shall be conveyed by new patent to such persons of the class specified, as may make requisite proofs in the land office—and thereupon the Attorney-General shall proceed to collect one and one-quarter dollars per acre for such lands, from the railroad companies; notwithstanding the railroad company may have conveyed the land, by quit-claim, for ten cents per acre. It is true that by amendment approved on February 12th 1896 (29 U. S. Stats. 6) it is provided that where lands are sold by credit contract, for partial payment less than one and one-quarter dollars per acre, the amount to be recovered from the railroad companies shall be the partial payment received; but this leaves the provision for collecting from railroad companies one and one-quarter dollars per acre for all lands erroneously patented to and sold by them for full payment made, still in force—except in so far as the Act of March 3rd 1887, is repealed by the Act of March 2nd 1896.

As before said, the Act of March 3rd 1887, provided for the issue of a *new patent* to good faith purchasers, after cancellation of the railroad patents, upon the making of prescribed proof in the land office—and for the collection, thereafter, from railroad companies, of the value of the land. In order, therefore, to maintain this as an action under the Act of 1887, to recover one and one-quarter

dollars per acre for lands in suit sold by the defendants, it was essential, in a jurisdictional sense, to plead and prove prior cancellation of those patents and issue of new patents to good faith purchasers who theretofore made requisite proofs in the land office; and as such is not the pleading or proof here, it cannot be said that the money demand here is sought to be recovered under the Act of 1887.

The first section of the Act of March 2nd 1896, however, destroyed whatsoever right of action (if any) to recover money value for the land was created by the Act of 1887; for, as before shown, unless and until the railroad patent had been canceled and a new patent issued to a good faith purchaser, the United States could have no such right of action, under the Act of 1887—and the Act of March 2nd 1896, declares that "no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled." In other words, before happening of the essential conditions precedent upon which right of action to recover money value of the lands depended, under the Act of 1887, the happening thereof was rendered impossible by passage of the Act of March 2nd 1896.

The provision in the Act of March 2nd 1896, that "the right and title of such purchaser is hereby confirmed," did not create a new or independent estate—thus leaving the Government's right of action intact as to the company's wrongful conveyance of some other estate in the same land. It sanctioned, ratified and confirmed the identical estate which the patent purported to convey; and to give force to confirmation is to perfect all imperfections and right all wrongs. **(Am. & Eng. Enc. of Law, Vol. 3,**

p. 498; Anderson's Dic. of Law, p. 224; Abbott's Law Dic., Vol. 1, p. 263; Black's Law Dic. p. 249.)

For these reasons, among others, and because the lands in suit were patented to and sold by the defendant prior to the passage thereof, it cannot be said that this action is founded on the Act of March 2nd 1896. Certainly Congress could not, on March 2nd 1896, create a right of action for the United States, to arise out of patents issued prior to that date.

III.

Were it true that the patents complained of were erroneously issued, still complainant is not entitled to recover any price for lands in suit sold by these appellants, because (a) by the Act of March 2nd 1896, Congress gratuitously and unconditionally confirmed the title thus sold and conveyed; (b) the demand for such payment is in assumpsit, at law; and (c) the Southern Pacific Railroad Company has not received, these lands included, the quantity of land granted by its granting Act.

As before shown, but for provisions of the Act of March 2nd 1896, attempted sales by the Southern Pacific Railroad Company of lands erroneously patented to it, did not stand in the way of cancellation of the patents—because such purchasers (prior to March 2nd 1896) were *mala fide* not *bona fide,* purchasers. Cancellation of the patents would have fully restored the title, and placed the United States *statu quo.* This being true, the United States had no right of action, prior to March 2nd 1896, to recover the value of lands thus sold; because such

right of recovery is an equitable alternative, dependent on inability to recover the title because of defendant's acts —sale to a *bona fide* purchaser, for instance. With cancellation of the patents, and recovery of title, all interest and concern of the United States ended. Whether the Southern Pacific remained liable for the money received from sale of the land, presented a question between vendor and vendee, with which the United States had no concern.

With full power to cancel the patents, and thus recover the lands, Congress enacted that the patents should not be canceled, and that vendor must pay the United States the specified price for the lands—*notwithstanding defendant sold the lands for less.* In other words, if the Southern Pacific sold the land for full payment of one-half dollar per acre, to a person whose title stands confirmed by the Act of March 2nd 1896, the Southern Pacific must pay the United States one and one-quarter dollars per acre, if the provisions of that Act are enforceable.

(a) The Act of March 2nd 1896, was not passed at appellants' request. The confirmation it makes, while entirely *ex parte* and unsolicited, is not on condition that the railroad companies pay, or promise to pay, any sum; but is absolute and unconditional. That Congress had the right to confirm the title of *mala fide* purchasers (characterizing them *bona fide* purchasers, or what-not), unconditionally or upon conditions to be accepted and performed by such purchasers, is admitted; but Congress is without constitutional power to adjudge or decree that railroad companies shall, because of such confirmation, be debtors of the United States. Whether the railroad com-

panies are debtors of the United States, and if they are in what amount, are questions for the judiciary to determine. If Congress has the power to impose a debt of one dollar per acre on railroad companies, it has equal power to impose a debt of one thousand dollars per acre. This Act is an attempt, by retroactive legislation, to establish a debt and adjudge the amount thereof. That such legislation is attempted usurpation of judicial authority, and a travesty on the constitutional right to be tried by the "law of the land," see **Cooley on Constitutional Limitation (III) page 124; United States v. Klein, 13 Wall. 147; United States v. Union Pac. R. R. Co., 98 U. S. 606.**

The United States had no right of action against defendant for the value of these lands prior to March 2nd 1896; and if it now has such right of action it was created by that Act. In other words, Congress, by its mandate, directed the courts to adjudge railroad companies debtors of the United States at rate of so much per acre. The essentials of a contract, *sufficient consideration and assent*, are wanting **(Vol. 1, Sec. 1, Parsons on Contracts).** Even had there been an express promise to pay, made after passage of the Act, no legal obligation would have attended. It would have been a *nudum pactum* based on past consideration, and could not have been enforced. A past consideration is not regarded in law as a valuable consideration—it is simply a gratuity. **(Vol. II, Sec. 16, Parsons on Contracts.)**

In the case at bar there was neither promise nor request from defendant, and where there is no sufficient consideration to support an express promise, a promise will not be implied.

(b). The real purpose of this suit is to procure a money judgment against the Southern Pacific for an amount equal to one and one-quarter dollars per acre for lands patented to and sold by it, but on the face of the bill it appeared to be a bill to cancel patents, with prayer for alternative relief in money if such concellation were barred by the Act of March 2nd 1896.

Equity jurisdiction on grounds of discovery, ended with the filing of defendant's answer **(Tiedman on Equity Jurisprudence, 1893, Sec. 550),** besides bills of discovery have become obsolete in modern practice **(Preston v. Smith, 26 Fed. Rep. 884; Ex-parte Boyd, 105 U. S. 647; Paton v. Majors, 46 Fed. Rep. 210; Riopelle v. Waldbridge, 26 Mich. 102; United States v. McLaughlin, 24 Fed. Rep. 823).**

Equity jurisdiction for cancellation of patents, appearing on the *face of the bill,* was shown by the *proofs not to exist* as to any of the lands sold by appellants; and an action to recover the value in money of those sold lands, cannot be joined with a suit to cancel patents for other lands **(Cherokee Nation v. S. K. Ry. Co., 135 U. S. 641; Scott v. Neely, 140 U. S. 107).**

The case proved shows no ground of equitable jurisdiction, as to the several tracts of land sold by appellants; so the bill should be dismissed *sua sponte* as to those lands.

In **Mills v. Knapp, 39 Fed. Rep. 592,** the plaintiff in his bill claimed (as in the case at bar) an exact sum, and the defendant pleaded to the merits. It was insisted that the defendant by pleading to the merits had lost the right of objecting for the first time to the jurisdiction of equity at the hearing. But the bill was dismissed, be-

cause the plaintiff had an adequate remedy at law. Blatchford, J. said:

> "Besides this, the plaintiff, on the face of his bill has a plain, adequate, and complete remedy at law. * * * No other equitable relief is asked. In such a case it is not necessary that the objection should have been taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked. Reynes v. Dumont, 130 U. S. 354; Kilbourn v. Sunderland, 130 U. S. 505. It is governed by the rule laid down in Lewis v. Cocks, 23 Wall. 466, where the court, finding the case to be an action of ejectment in the form of a bill in Chancery, ordered the bill to be dismissed, although the objection was not made by demurrer, plea, or answer, or suggested by counsel; saying that, as it clearly existed it was the duty of the court *sua sponte* to recognize it, and give it effect. It results from these views that without inquiring into the merits of the case, the bill must be dismissed with costs."

To the same effect is **Litchfield v. Ballou, 114 U. S. 192; Killian v. Ebbinghaus, 110 U. S. 573; Perego v. Dodge, 163 U. S. 160).**

As to all lands sold by the Southern Pacific, the case at bar is a *common law action of assumpsit* to recover a debt of specific amount (the number of acres multiplied by the price per acre), for which there would be "a plain and adequate remedy at law", if there be such debt. If complainant has a lawful demand for the value of lands the Southern Pacific has sold, the remedy is just as efficient at law as in equity **(Oelrichs v. Spain, 15 Wall. 227). Clark on Contracts, page 764,** under the heading "Money received for the use of another", states the rule as follows:

"317. Whenever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay the latter, and the obligation may be enforced by assumpsit."

In **Gaines v. Miller, 111 U. S. 397,** it was held:

"Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. (Citing a list of authorities) The remedy at law is adequate and complete."

For these reasons we say the bill should be dismissed as to all lands sold to persons whose title is confirmed by the Act of March 2nd 1896.

(c). It is stipulated (Tr. Vol. 2, p. 488) that the Southern Pacific has not received the full quantity of land promised in its grant.

In **United States vs. Winona, 165 U. S. 482,** among other reasons assigned by the Court why the United States should not recover the value of lands erroneously patented to and sold by the company to *bona fide* purchasers, is the following:

"But lastly, and chiefly, it does not appear from the record either that the railroad company received an excess of lands, or has ever received (these lands included) the full quantity of lands provided in the grant."

It is respectfully submitted that the bill should be dismissed.

WM. SINGER, Jr.,
Attorney for Defendants.

WM. F. HERRIN,
Counsel for the Defendants.

See page 104

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NO. 1045

IN THE

United States

Circuit Court of Appeals

Ninth Circuit.

APPEAL FROM UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF CALIFORNIA

Southern Division.

FILED
JUN 18 1904

Southern Pacific Railroad Company, *et al.*,
Appellants and Defendants.
vs.
The United States.

Brief for United States.

JOSEPH H. CALL,
Special United States Attorney.

SPENCER & PARKER, Law Printers, 238 New High St., Los Angeles, Cal.

CONTENTS.

APPENDIX.

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SOUTHERN DIVISION,

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STATEMENT.

This bill was filed on February 28, 1901, by the United States against the Southern Pacific Railroad Company, and numerous other defendants, to quiet title and to concel and annul patents to certain lands situated in California, erroneously issued by the United States to the Southern Pacific Railroad Company, as a part of its grant of March 3, 1871, in so far as such lands had not

been sold by said railroad company to *bona fide* purchasers. [R. 5, 14.] The bill further seeks an adjudication by the court as to what lands have been sold to *bona fide* purchasers and as to those, prays that the title of such purchasers may be confirmed, and that the government have and recover from the railroad company the ordinary government price for such lands.

Answers were filed by the defendants as follows:

The answer of Southern Pacific Railroad Company, the Central Trust Company of New York, as trustee, D. O. Mills and Homer S. King, as trustees, was filed August 3, 1901. [R. 82.]

The answer of I. N. Van Nuys was filed March 18, 1901. [R. 108.]

The answer of Riverside Vineyard Company was filed March 18, 1901. [R. 30.]

The answer of Charles H. Colwell and Russ Avery was filed May 24, 1901. [R. 43.]

The answer of J. P. Kyler was filed May 18, 1901. [R. 53.]

The answer of Frank Walker was filed June 11, 1901. [R. 71.]

The answer of H. S. Button was filed May 24, 1901. [R. 42.]

The answer of William H. Davis was filed May 24, 1901. [R. 62.]

Decree was entered upon the merits by the Circuit Court in favor of the Government quieting title to lands not patented, vacating patents for lands patented and not sold and for $1.25 per acre for patented lands sold

to *bona fide* purchasers, and confirming the titles of *bona fide* purchasers of patented lands. [R. 114.] The railroad and its trustees alone appeal.

The controlling facts in this case are the following:

On March 3, 1871, Congress made a grant of lands to aid in the construction of the Southern Pacific Railroad from a point near Tehachapa Pass via Los Angeles to the Colorado River, at or near Fort Yuma. [146 U. S. Stats. 292 and 16 U. S. Stats. 573.]

It is a conceded fact alleged in the bill and admitted by the answer [R. 85] and stipulated also [R. 131] that the map showing the line of railroad of the Southern Pacific Railroad Company as definitely located and constructed opposite to the lands described in the bill, was filed in the Interior Department in the year 1874, and it is conceded that the lands in suit are situate within the granted or place limits of the Southern Pacific grant.

It is also admitted by the pleadings and fully established by the evidence, that in the year 1838 a grant was made by the Mexican government to one Juan Bandini, of the land or rancho called Jurupa. [Record 150-161.] See also defendants' answer. [Record 82.]

This grant was one of specific boundaries, and not a grant of quantity.

The United States Board of Land Commissioners, upon petition of Juan Bandini, confirmed this grant to him under date of October 17, 1854. [Record 159-160.]

Upon appeal to the United States District Court, one Abel Stearns was substituted for Bandini [R. 187] and

the District Court affirmed the decree of the Board of Land Commissioners, thereby confirming the grant to Abel Stearns. [Record 163, 165.]

In the year 1872 the Rancho Jurupa confirmed to Abel Stearns as aforesaid, was duly surveyed by the Land Department of the United States, under orders of the Surveyor General for California.

The survey was made by William P. Reynolds, deputy surveyor, and his assistants, and in that year the field notes of the survey, together with a plat thereof, were duly returned to the office of the Surveyor General, and on February 26, 1872, the plat and field notes were formally approved by I. R. Harenburgh, surveyor general. [For map see Record 356, 357 and field notes Record 168, 177, 359.]

It is an undisputed fact in this case and was so found by the Circuit Court, that the lands in suit and described in the bill, are embraced within the boundaries of the Jurupa Rancho, as surveyed in 1872, and according to the map and field notes approved in that year by the Surveyor General.

Thereafter a dispute arose concerning the true boundaries of the Jurupa Rancho, and in the year 1877, a new survey was ordered [Record 205], which survey was made in the year 1878, excluding these lands, and upon such later survey, patent was issued on May 23, 1879, to Abel Stearns and accepted by him. For township plats showing both surveys see Record 221 and 620.

The map of definite location of the Southern Pacific Railroad, opposite to this land, as before stated, was filed

in the year 1874 and as it appears that from the year 1872 down to the year 1879, this land was embraced within the boundaries of the Jurupa Rancho as surveyed and approved, it was, under the firmly established decisions of this court and of the United States Supreme Court, *sub judice* in the year 1874, when the grant to the Southern Pacific Railroad took effect, and these lands could not have been operated upon by the grant to that company, which operated only on *public lands* and which expressly reserved and excepted from its operations, all lands reserved, and all lands as to which any adverse *claims* were made at the time of definite location.

Notwithstanding the reservation of these lands and the fact that they were excepted from the Southern Pacific grant, patents of the United States were erroneously issued to numerous tracts embraced within the Jurupa Rancho, according to the approved survey of 1872 as lands inuring to that company under its grant of 1871.

The bill of complaint seeks to vacate patents to the lands so erroneously patented so far as not sold by the Southern Pacific Railroad to *bona fide* purchasers, and seeks to determine and to quiet the title to the lands not so patented, and further, seeks an accounting from the railroad company for the government value of such lands as have been erroneously patented and sold to *bona fide* purchasers.

The decree of the Circuit Court was in favor of the government in all respects, which found the facts substantially as herein stated. [Opinion Record 123, decree Record 114.]

In the cases of Southern Pacific Railroad Company vs. Brown and same vs. Bray, 75 Federal, 85, this court had under consideration the title to lands situated precisely as the lands in the present suit. Those lands were also claimed by the Southern Pacific as a part of its grant of 1871, and they were embraced within the survey of the Jurupa Rancho, approved in 1872 and this court affirmed the decree of the Circuit Court, adjudging that those lands were excepted from the Southern Pacific grant.

That the lands in suit in the present case were *sub judice* in 1874, and were claimed as a part of the Jurupa Rancho, at that time, is conclusively established by the fact that they were surveyed and included in that rancho by the authorities of the United States, and by the affidavits of William P. Reynolds, U. S. Deputy Surveyor, and by five of his assistants, which affidavits are annexed to the field notes [Record 386,387]; all of said persons stating under oath

> "that in surveying the boundary lines of the Rancho Jurupa, situated in the county of San Bernardino, in the state of California, and finally confirmed to Abel Stearns, and that said rancho has been in all respects to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments established according to the laws of the United States and the instructions of the Surveyor General."

Defendants' Contentions.

Counsel for the Southern Pacific again put forth the old and worn out claim that because the Reynolds' sur-

vey was not regular in all respects, and was not followed up to patent and having been finally rejected and a resurvey made excluding the lands in suit, that therefore such survey and acts of the government were insufficient to prevent the passage of the title to these lands to the Southern Pacific Railroad, and they urge in support of this threadbare argument, numerous grounds or reasons showing the irregularity of the Reynolds survey.

The doctrine of *sub judice* does not and never did rest upon the ground that the claim to the lands was a valid one, but only upon the ground that the lands were adversely claimed or were otherwise *sub judice,* which claim remained undetermined.

This doctrine which is referred to by this court in the Brown and Bray cases, is one so thoroughly established that it would not be strengthened by the citation of numerous authorities.

Of course if the Reynolds survey approved in 1872 had been regular in all respects, and if there had been no contraversy over the boundaries of the Jurupa, this controversy could not have arisen, for these lands would have been patented to Stearns.

It is because there was a controversy over the boundaries of the rancho and because different surveys were made, that the lands were held in reservation, and the lands thereby *sub judice* were excepted from the railroad grant.

The decree of the District Court confirming the Jurupa to Stearns as successor of Bandini, shows that the

grant so confirmed was one of specific boundaries, provided that the land within such boundaries be less than 11 square leagues, and if less, then confirmation was only as to the quantity of 11 square leagues. [Record 163,165.]

The court knows judicially, that a Spanish league is 2.635 English miles in length, and that one square league contains 6.94 square miles, and that 11 square leagues contain 48,857 acres.

The Reynolds survey including the lands in suit, approved in 1872, as stated upon the plat of survey [Record 356], embraced 38,887.42 acres, which is considerably less than 11 square leagues, which contains 48,857 acres.

The grant therefore, of the Jurupa Rancho, according to the Reynolds survey of 1872, which survey embraced more lands than any other survey of that grant, still contained less than 11 square leagues and the grant therefore was clearly one of specific boundaries and not a grant of quantity. It is a curious fact in this case, that the lands in suit were excluded from the Reynolds survey of the Jurupa Rancho, by reason of straightening the *north* line of the rancho. [See Reynolds' map, Record 356, and Minto map of patented rancho, Record 396.]

This is striking in view of the circumstance that the Secretary of the Interior in ordering a re-survey of the Jurupa, adopted the Reynolds survey, excepting as to the *eastern* and *southern* boundaries [Record 192, 193],

and yet the Southern Pacific Railroad Company appears to have been sufficiently influential in the Interior Department, even in those early days, to get a new survey made which would exclude a large part of the lands theretofore embraced in the Jurupa grant by changing the *northern* line.

The record shows that as early as 1877, the Southern Pacific Railroad Company, through its attorney, H. S. Brown, was interfering with the survey of the Jurupa Rrancho, and attempting to influence the action of the Department. [Record 209.]

Mistakes of Counsel for Appellants.

Counsel for the Southern Pacific state in their brief at page 26,

> "It is stipulated that the Southern Pacific has not received the full quantity of land promised in its grant."

It was not in fact so stipulated, but on the contrary, the stipulation made is as follows:

> "It is further stipulated that within the indemnity limits of the grant to the Southern Pacific Railroad Company made by the Act of Congress of March 3, 1871, and outside of the twenty mile limits, there now remain more than fifty thousand acres of surveyed public lands of the United States for which there has been no selection or application to select, made by said company." [Record 132, 133.]

It is a very different thing to stipulate that there are 50,000 acres of lands within the Southern Pacific *indemnity limits,* which have never been selected, and to

stipulate that the Southern Pacific has not received the quantity of lands promised in its grant. The alleged stipulation referred to by counsel [Record 488], grew out of a question propounded to Jerome Madden, land agent, and a witness for the Southern Pacific, asking him to state how many acres of land there were within the indemnity limits of the Southern Pacific which remained open lands, and his answer was: "I cannot without examination." Thereupon Mr. Call stated as follows: "I will concede that the quantity called for by the preceding question of Mr. Singer, exceeds 10,000 acres."

The facts thus established beyond dispute are, that there is an abundance of land within the limits of the Southern Pacific grant which it never had selected or attempted to select, and there is not a suggestion to the contrary, that there is a shortage in the Southern Pacific grant.

In Oregon Railroad v. United States, 189 U. S. 103, at page 115, the court said:

> "It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition prior to definite location by sale and otherwise of lands within the granted limits. *But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect to place limits.*"

Points and Authorities.

FIRST.

The right of the defendants to object to the jurisdiction in equity has been waived

The defendants answered to the merits without demurrer or plea to the jurisdiction in equity, and have put the government to the expense of taking of testimony, and the cause has been submitted and tried upon the merits.

Under these circumstances the defendants have waived any right to object to the final determination in this cause, as one in equity, the court having power to grant the relief sought.

United States v. Southern Pacific Railroad Co., 117 Fed. 544;

Williams v. Monroe, 101 Federal 322, 329;

Brown v. Lake Superior Co., 134 U. S. 530, 535, 536;

Insley v. United States, 150 U. S. 512, 515, 516;

Perrego v. Dodge, 163 U. S. 160, 164;

Kilbourn v. Sunderland, 130 U. S. 505, 514.

This was also the opinon of Judge Ross in the court below.

SECOND.

These lands were *sub judice* during the year 1874 when the grant to the Southern Pacific Railroad Company attached by filing map of definite location, and were excluded from that grant, and the patents thereto were invalid.

The precise question here presented was involved in the cases of Southern Pacific Railroad Company v. Brown and Bray, and were decided against the contentions of the railroad company by this court and by the United States Circuit Court in 68 Federal 333 and 75 Federal 85, which cases involved other tracts of land embraced within the Jurupa Rancho, as surveyed by Reynolds, and as to which lands the Southern Pacific Railroad Company sought a recovery from defendants Brown and Bray, and no appeal was taken from those decrees of this court.

The principle that lands embraced within the limits of a Mexican or Spanish grant, *sub judice* when the grant takes effect, or which are covered by a subsisting pre-emption or homestead filing, or mineral claim, or other *claims* or rights, are excepted from railroad grants is so thoroughly settled that citation of authority is hardly necessary, but some of the leading cases are the following:

Newhall v. Sanger, 92 U. S. 761;
Doolan v. Carr, 125 U. S. 618;
Cameron v. United States, 148 U. S. 301;
Witney v. Taylor, 158 U. S. 85;
Sioux City Railroad v. Griffey, 143 U. S. 32, 41;

Northern Pac. R. R. v. Musser-Sauntry, 168 U. S. 604;
Northern Pas. R. R. v. Sanders, 166 U. S. 620;
Bardon v. Northern Pac. R. R., 145 U. S. 535.

Whenever the law provides for a survey of a Mexican grant by the Commissioner of the General Land Office, or by his inferior officer, the Surveyor General for the District of California, it is presumed when such survey has been made and aproved that such survey was made in accordance with law, and will be binding upon the government, and all others, until reversed or set aside by a higher authority.

McCreery v. Haskell, 119 U. S. 327;
Tubbs v. Wilhoit, 138 U. S. 134.

As before mentioned, the Reynolds survey and field notes thereof were formally approved by the Surveyor General for California in the year 1872, which approval so remained until vacated by the Secretary of the Interior in 1879.

It was adjudged in the McCreery and Tubbs cases that where a survey had been approved by the Surveyor General, whether under the act of July 23, 1866, or some other act of Congress, that such approved survey was controlling and binding as to lands excluded from the Mexican grant by such survey and disposed of by the government, even though the action of the Surveyor General might thereafter be annulled.

The decisions of the Commissioner of the General Land Office of 1876, and of the Secretary of the Interior,

1878, in evidence herein, show that a controversy had been pending for many years concerning the true boundaries of the Jurupa Rancho, the claimants contending for a much larger area than admitted by adverse interests, and this controversy was not closed until patent was finally issued for the Jurupa Rancho to Stearns, successor of Bandini, on May 23, 1879, long after the grant to the Southern Pacific Railroad Company took effect.

It is contended by counsel for defendants that the doctrine of *sub judice* does not apply to these lands, for the alleged reason that the survey made by the Surveyor General, was commenced and completed before the Rancho Jurupa had been finally confirmed, and this contention is based upon the ground that an appeal was taken from the United States District Court confirming the grant, to the Supreme Court, which court did not issue its mandate until the year *1875*. [Record 507.]

(a) If the survey made and approved by the United States Surveyor General had been valid, these lands would have been patented to the claimants of the Jurupa Rancho. The circumstance that another reason has been discovered by counsel for defendants, why the survey made and approved by the Surveyor General, should have been reversed, and set aside as it was, does not in any wise mitigate against the contention of the government that the lands in suit were *sub judice* in 1874, for, by the showing made by counsel for defendants, it appears that the final mandate of the Supreme Court was not issued until 1875, while an approved survey by the

United States Surveyor General, had stood over these lands since 1872.

The fact that an appeal was taken from the decree of confirmation of the District Court, to the Supreme Court, which was dismissed in 1875, for failure to docket and file the record, is not new to this case. That fact was shown and was before this court in Southern Pacific Railroad v. Brown and Bray, which fact appears from Plaintiff's Exhibit 5 in the present case [Record 188 and 337], which is a part of the record taken from the former suits, of S. P. Rd. Co. v. Brown, *et al.*

As this court and the United States Supreme Court has often observed, it is not the validity of the claim which renders the land *sub judice* and prevents it from passing under a railroad grant, but it is the fact that a claim exists to the land, and that the controversy as to the title was still undetermined.

(b) Further, it does not appear that the decree of the United States District Court was *superseded* by any appeal to the Supreme Court. If not superseded the decree of the District Court remained in full force.

(c) Moreover, it does not appear from the record but that the survey made by the Surveyor General was commenced and completed prior to any appeal taken from the District Court to the Supreme Court.

(d) Moreover, it does not appear that any appeal was ever *perfected* in the Supreme Court, for it does appear from the order of dismissal that it was dismissed for the reason as follows: "It appears that the said appellant

has failed to have its cause filed and docketed in conformity to the rules of this court." [R. 189.]

Nothing in any of these proceedings show that the decree of confirmation of the District Court was not in force when the Reynolds survey was made or approved.

However that may be, the survey which was in fact made by the Surveyor General, including therein the lands in suit, shows that a *claim* was made to these lands which was undetermined when the railroad grant took effect in 1874.

(c) Again, it is urged by counsel for defendants, that the survey of the Rancho Jurupa was made under the Act of Congress of 1864, and that no survey under that act could be *completed* until approved by the Commissioner of the General Land Office.

It appears that the plat and field notes of the Reynolds survey of the Jurupa approved by the Surveyor General in 1872, were transmitted to Washington *and placed upon the files of the General Land Office* as the copy of the plat and field notes introduced in evidence in this cause are certified by the Commissioner of the General Land Office, as records being upon file in his office.

Referring to the general authority of the Surevyor General, over lands in this district, the Supreme Court said in Tubbs v. Wilhoit, 138 U. S. 142, 143:

> "Until April 17, 1879, it had not been the practice of the Land Department to require any specific approval by the Commissioner, either of surveys of the public lands, or plats of townships in accordance therewith, made by the Surveyor General of

the state before they were deemed so far final as to sanction sales or selections of the lands surveyed and platted."

And the court quoting from a late decision of Secretary Schurz, said:

"By the act of Congress, approved May 1, 1796, (1 Stat. 464) 'providing for the sale of the lands of the United States in the territory northwest of the river Ohio and above the mouth of the Kentucky River,' the Surveyor General was authorized to prepare plats of the townships surveyed, to keep one copy of the same in his office for public information, and to send other copies to the 'places of sale,' and to the Secretary of the Treasury. The present local land offices are equivalent to the 'places of sale' mentioned in the act of 1796, and, as a matter of practice, from that date to the present time the township plats prepared by the Surveyor General have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the act of 1796, or in the subsequent acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department. There can be no doubt but that under the act of July 4, 1836, reorganizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor

> General. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer."

But it is in no wise material whether the survey could be finally made and completed until approved by the Commisisoner, because the fact that a survey was made by the officers of the United States who were authorized to make surveys shows that a claim was made to this land by the authority of the United States, as lands which should be and ought to be patented to the claimants of the Mexican grant, and such survey was initiated and carried through for the purpose of setting apart and reserving for the Mexican grant claimant the specific land to which he was entitled.

(f) The act of Congress of July 23, 1866, (Vol. 14, p. 218, Sec. 8) controlled the Reynolds survey of 1872, which provides as follows:

> "SEC. 8. That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, 'To expedite the settlement of titles to lands in the state of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the Surveyor General

of the United States for California, as soon as practicable after the expriation of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States."

In Durand v. Martin, 120 U. S. 366, 369, the court said:

> "This survey was made in 1869, the claim having been finally confirmed in 1860. As the survey was not made until more than ten months after the act of July 23, 1866, 'to quiet land titles in California,' had become operative, its approval by the Surveyor General had the effect, under the ruling of this court in Fraser against O'Connor, 115 U. S. 102, of opening all lands within the exterior boundaries of the grant, but outside of those fixed by the survey, to selection or pre-emption entry as public lands, subject only to a defeat of title, if in the end the survey as made should be set aside and the boundaries of the grant finally extended so as to include the selection or the entry."

By virtue of the act of 1866, if a survey and plat had not been requested within ten months from the date of the approval of that act, it was the duty of the Surveyor General to complete the survey of the grant, and as the Reynolds survey was not made until more than ten

months after the passage of the act of July 23, 1866, and more than ten months after the confirmation of that grant, it was presumptively controlled by the terms of that act, and that survey by its approval would have been final and complete without any approval of any other officer, if it had not been set aside by order of the Secretary of the Interior.

THIRD.

This suit was properly brought and is maintainable in equity to quiet title to lands, to cancel patents to lands, and for the alternative relief in case such lands have passed into the hands of bona fide purchasers for the value of such lands.

(1.) The principal object of this suit is to determine the title to the lands as between the United States and the defendants.

The act of Congress of March 2, 1896, relating to the adjustment of railroad land grants, expressly authorizes any person claiming to be a *bona fide* purchaser from a railroad company of lands erroneously patented to the company and sold by it to maintain a suit in the United States courts against the United States, to secure a confirmation of his title.

The United States also has a right to maintain a bill in equity to quiet and determine title to lands claimed adversely to the government.

The Statutes of California, Code of Civil Procedure, Section 738, authorizes suits in equity to quiet and determine title to lands.

Pennie v. Hildreth, 81 Cal. 127, 130;
Pierce v. Felter, 53 Cal. 18.

It is well settled that the federal courts will administer such relief in equity where authorized by state statute.

Reynolds v. Crawfordsville, 112 U. S. 405, 412;
Chapman v. Brewer, 114 U. S. 158, 170, 171;
More v. Steinbach, 127 U. S. 70, 84;
Hammer v. Garfield, 130 U. S. 291, 295.

(2.) The right of the United States to vacate and annul patents erroneously issued by the Land Department, by bill in equity, is sustained by an unbroken line of authority.

United States v. Stone, 2 Wall. 525, 535;
United States v Minor, 114 U. S. 233;
Mullan v. United States, 118 U. S. 271;
United States v. Bell, &c. Company, 128 U. S. 315, 362;
Colorado &c. Co. v. United States, 123 U. S. 307, 313;
United States v. Southern Pacific R. R., 146 U. S. 570, 619;
Wisconsin Railroad v. United States, 164 U. S. 190, 211.

The jurisdiction in such cases is maintained in equity as arising in accident or mistake.

Whether the mistake is of law or of fact is of no consequence in cases of this character, for the reason that the officers of the Interior Department, who exercise

ministerial powers, cannot bind the United States by their unauthorized acts.

In Mullan v. United States, 118 U. S., at page 278, the court holding that patents erroneously issued could be vacated by a bill in equity, said:

> "It is no doubt true that the actual character of the lands was as well known at the Department of the Interior, as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the state, but this does not alter the case. The list was certified without authority of law, and therefore by a mistake against which relief in equity may be afforded."

In Wisconsin Central Railroad v. United States, 123 U. S., at page 209, the court quoted the above extract from the Mullan case, with approval. See also:

Wisconsin Rd. v. U. S., 164 U. S. 190, 209, 212;
Story's Eq. Jur., Sec. 134.

Indeed, in every case which has been brought by the United States to vacate patents to lands which were excepted from the operation of a grant by Congress to a railroad or other person, the suit has been founded and maintained because of error of law in the officers of the Interior Department.

(2) The patents to these lands were issued to the Southern Pacific Railroad Company erroneously and under a mistake by the officers of the Interior Depart-

ment. The railroad company has sold most of them to *bona fide* purchasers, and by reason of the acts of the defendant railroad company the lands cannot be recovered by the United States, but these acts of the defendant do not defeat the power of a court of equity to grant relief, nor do they relieve the defendant from its liability to make restitution to the government.

Alternate Relief.

(3) The bill of complaint prays in the alternative for the government price of the lands in case the lands themselves cannot be recovered by reason of sales to *bona fide* purchasers.

The right of a complainant to plead in the alternative in such cases and the power of the court and its usual practice to grant relief in such cases is well settled.

May v. Claire, 11 Wall. 236, 237;

Cook v. Tullis, 18 Wall. 342;

Parkersburg v. Brown, 106 U. S. 487;

Pullman Company v Central Co., 171 U. S. 138, 147;

Story's Equity Pleading, Secs. 42a, 42b.

FOURTH.

Special jurisdiction in equity has been conferred by Congress upon the Circuit Court to confirm titles of bona fide purchasers and render judgment against the railroad company for value of lands.

The act of Congress of March 2, 1896, specially provides that if the court shall find that lands erroneously patented have been sold to *bona fide* purchasers, and such purchasers are before the court, that it shall confirm the title of the purchasers and render judgment in favor of the government for the value of the land, not exceeding the ordinary government price.

This is a constitutional exercise of power by Congress and creates an additional and new ground of equity which may be administered.

Holland v. Challen, 110 U. S. 15;

Arndt v. Griggs, 134 U. S. 316, 320;

Bardon v. Land Co., 157 U. S. 327, 330;

Cowley v. Railroad Co., 159 U. S. 569, 583;

United States v. Southern Pacific Railroad, 117 Fed. 544;

United States v. Oregon Railroad, 122 Fed. 541.

FIFTH.

This bill is cognizable in equity as one brought to avoid multiplicity of suits.

The numerous parties defendant in this cause might each indepedently and separately have maintained an action against the United States to determine title to the lands described in the bill and claimed by such defendant. Such a proceeding is authorized by the act of Congress of March 2, 1896, and but for this bill presenting the entire matter in a single suit, it may fairly be presumed that such numerous indepedent proceedings would have been brought. This suit in equity is therefore maintainable as one to avoid multiplicity, the defendants all claiming under the same title and source of title.

United States v. Southern Pacific Railroad Co., 117 Fed. 544;

Pomeroy's Eq. Jur. 256, 269;

Davis v. Gray, 16 Wall. 203, 232, 233;

Brown v. Guarantee Trust Co., 128 U. S. 403, 410;

Ogden v. Armstrong, 168 U. S. 224;

Smyth v. Ames, 169 U. S. 466;

Hayden v. Thompson (8 C. C. A.), 71 Fed. 60, 67;

Kelley v. Boettcher (8 C. C. A.), 85 Fed. 55, 64;

Ryan v. Seaboard & R. R. Co., 89 Fed. 397, 406;

Barcus v. Gates (4 C. C. A.), 89 Fed. 783, 791;

Bailey v. Tillinghast, 99 Fed. 801 (C. C. A.);

Whitehead v. Sweet, 126 Cal. 67, 75, 76;

Southern Pacific Company v. Robinson, 132 Cal. 408.

It appears, by all the authorities, including the above, that it is not necessary that the defendants should have a common or joint interest in the subject matter of the suit, but they may be joined in a single suit, to avoid multiplicity, when there is a question of fact or of law common to all.

In the present suit the defendants all claim title under the act of Congress of March 3, 1871, and they all claim to be *bona fide* purchasers under similar facts, and under the provisions of the acts of Congress of March 3, 1887, and March 2, 1896.

Not only are the questions of law common to all of the defendants, but the questions of fact are similar in each case; and, moreover, the defendants all claim under the Southern Pacific Railroad Company, a common source of title.

It is, therefore, submitted that this case is cognizable in equity to avoid a multiplicity of suits, if for no other reason, and if upon no other grounds.

SIXTH.

It is a well settled principle in equity that where land or other property has been transferred from one to another wrongfully or under a mistake, that the court will establish and construct a trust in the property, and in its proceeds, in favor of the beneficiary, and against the person wrongfully holding it, and will require the trustees to return the property or its value.

In the present case the lands were excepted from the Southern Pacific grant. The railroad company had no right to them, and that fact was known to the company as a matter of law.

It was not within the *intention* of the United States to convey them to the defendant, and that intent is shown by the granting act.

The defendant is therefore bound in equity to reconvey the lands to the United States if still within its power to do so, and if not, then to pay to the United States what it received for them, or the reasonable value of the lands. This duty is required as a matter of justice, and its enforcement is decreed by an unbroken line of authority:

United States v. Southern Pacific Co., 117 F. 544;
Perry on Trusts, Sec. 186;
Story's Eq. Jur., Secs. 134, 1261, 1263;
Pomeroy's Equity Jurisp., Secs. 155, 156, 1044;
May v. Le Claire, 11 Wall. 217, 236;
Cook v. Tullis, 18 Wall. 332, 341, 342;
Angle v. Chicago Rd., 151 U. S. 1, 26, 27;

Townsend v. Vanderwerker, 160 U. S. 171, 179;
New Orleans v. Warner, 175 U. S. 120, 129;
Clews v. Jamieson, 182 U. S. 461, 479.

The provisions of the California Statutes are in full harmony with the general principles of equity governing such transactions.

It is provided in Civil Code of California, Sections 2224, 2229 and 2237, as follows:

> "Sec. 2224. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it.
>
> "Sec. 2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.
>
> "Sec. 2237. A trustee who uses or disposes of the trust property, contrary to section 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

In Taylor v. Benham, 5 How. 233, at page 274, where a trustee had disposed of trust property, the Supreme Court said:

> "So, every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of

trust.' Kane v. Bloodgood, 7 Johns. Ch. Rep. 110; Scott v. Surman, Willes 404; Shakeshaft's case, 3 Bro. Ch. Cas. 198.

"He is liable, then, first, on the ground that the *cestui que* trusts might confirm the sale and resort to the proceeds, as they finally did in this case. Story's Eq. Jurisp., Sec. 1262; 2 Johns. Ch. R. 442; 1 *ibid.* 581."

An implied or constructive trust is deemed by courts of equity to exist when the property of one has been acquired by another by wrong, error, accident or *mistake*.. The subject is treated of by leading authorities as follows:

In Perry on Trusts, section 186, it is said:

"If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee, and will execute the trust by reforming the deed, or by ordering a re-conveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such mistake."

In Pomeroy's Equity Jurisprudence, it is said at Sections 155 and 1044:

"Section 155. The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law from the deeds, wills, contracts, acts or conduct of parties, without any *express* intention, and often without *any* intention, but always without any words of declaration

or creation. They are of two species, 'resulting' and ' constructive,' which latter are sometimes called trusts *ex malcficio;* and both these species are properly described by the generic term 'implied trusts.' * *

"If one party obtains the legal title to property not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." * * *

"Section 1044. Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation and in most cases contrary to the intention of the one holding the legal title and where there is no express or implied written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum;* and this phrase furnishes a criterion generally accurate and suffi-

cient for determining what trusts are truly 'constructive.' "

When once the property has been acquired by mistake and under circumstances in which a court of equity for purposes of justice decrees the existence of a trust, such trust follows the proceeds derived from such property in whatsoever form received.

The beneficiary is not bound by the acts of the trustee, but has an option to recover the property if not transferred, or if sold to *bona fide* purchasers to confirm the sale, and seize upon the proceeds.

The principle is stated in Story's Equity Jurisprudence, at Section 1262, as follows:

> "In cases of this sort, the *cestui que trust* (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property; or he may disclaim any title thereto, and proceed upon any other remedies, to which he is entitled, either *in rem* or *in personam*. The substituted fund is only liable to his option. But he cannot insist upon opposite and repugnant rights. Thus, for example, if a trustee of land has sold the land, in violation of his trust, the beneficiary cannot insist upon having the land, and also the notes given for the purchase money; for, by taking the latter, at least, so far as it respects the purchaser, he must be deemed to affirm the sale. On the other hand, by following his title in the land, he repudiates the sale."

In May v. Le Claire, 11 Wall., at pages 236 and 237, the court said:

> "There are kindred principles in equity juris-

prudence whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust*. The cardinal principle is that the wrongdoer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust,* and equity will so mould and apply the remedy as to give them to him.

* * * * * * * * *

"In this case more than half the residuary devisees of Antoine Le Claire are not before us. We cannot, therefore, decree the conveyance of real estate, but his legal representatives are before us, and we can give a money decree against them, embracing the value of the land, which we might otherwise adjudge to be conveyed."

* * * * * * * * *

"All those securities, including the collaterals, belonged in equity to May from the time they were deposited with Cook & Sargent. LeClaire had no right to change their form or to dispose of them, as was done in carrying out the compromise agreement. It is within the power of this court, in the exercise of its equitable jurisdiction, to annul that arrangement, and hold Davenport and LeClaire's estate liable in all respects as if the compromise had not been made. *But it is also in our power to confirm the transaction, and upon the principles of constructive trusts, to give May its fruits instead*

of pursuing the effects themselves. This, as the case is presented in the record, we deem the proper course."

In Cook v. Tullis, 18 Wall., at page 342, the court said:

> "that property acquired by a wrongful appropriation of other property covered by a trust, is itself subject to the same trust. It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property in its original form?"

In Pullman Car Company v. Central Transportation Company, in which the jurisdiction in equity was sustained the court said: [See 171 U. S. 150. 151.]

> "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an *implied contract* of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain." * * *

In Clews v. Jamieson, 182 U. S., at pages 479, 480, the court said:

> "Pomeroy in his work on Equity Jurisprudence,

second edition, instances among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume 1, at section 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only, is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust,* and will compel the trustee to do all the specified acts required of him by the terms of the trust. *It often happens that the final relief to be obtained by the cestui que trust consists in the recovery of money. This remedy the courts of equity will always decree when neces-*

> *sary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.'*. I Pom. Eq. Jur. sec. 158."

Counsel for appellants (Defts. Brief, p. 27) undertake to quote from the opinion in Gaines v. Miller, 111 U. S. 397, as follows:

> "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. (Citing a list of authorities.) The remedy at law is adequate and complete."

Immediately following the above statement the court proceeded in its opinion as follows:

> *"There is no averment in the bill of complaint of any ground of equity jurisdiction. No trust is alleged, no discovery is sought. The appellant has no lien on the property of Hammond's estate and avers none."*

Reading all that the court said upon that subject will show that the case of Gaines v. Miller in no respect resembles the present suit, which does allege that these patents were erroneously issued by the United States to the railroad company and presents the following grounds of equity: (1) a suit to quiet title to lands, (2) a suit to vacate patents to lands, (3) the alternative relief sought for the value of the lands in lieu of the lands themselves, in case of sales to *bona fide* purchasers, (4) a special jurisdiction in equity conferred by the act of Congress of 1896, (5) numerous defendants show-

ing that the bill may be maintained to avoid multiplicity of actions by those defendants against the United States and by the United States against them, (6) to relieve upon the ground of mistake in the issuance of these patents, and an application of the equitable principle, that a trust exists in the money received by the defendant from such lands.

It is submitted that the cases hereinbefore cited are controlling upon these branches of equity.

SEVENTH.

The principal is well settled that where a court of equity takes jurisdiction of a cause upon one ground, pertaining either to its exclusive or concurrent jurisdiction, that it will retain it to do complete justice, even to granting legal remedies.

United States v. Southern Pacific Railroad Co., 117 F. 544;
United States v. Union Pacific Railroad Co., 160 U. S. 1, at page 52;
Ober v. Gallagher, 93 U. S. 199;
Root v. Railway, 105 U. S. 189, 205, 208;
Ward v. Todd, 103 U. S. 327;
Joy v. St. Louis, 138 U. C. 1;
Hopkins v. Grimshaw, 165 U. S. 342, at page 358;
Smyth v. Ames, 169 U. S. 466, 516, 517;
Peck v. Ayers, 116 Fed. (C. C. A.) 273;
Lynch v. Elevated Railroad Co., 129 N. Y. 274;
Douglas v. Lumber Co., 118 F. 438 (C. C. A.)

EIGHTH.

(1) By the authority reserved in Congress to alter, amend or repeal the act of July 27, 1866, Sec. 20 (see appendix) the United States may pass any supplemental law, the object of which is to carry out the national purposes disclosed by the act of 1866, the purposes of which mainly were to secure to the United States the use of the road, and to adjust the grant to the railroad company awarding to it what it is entitled to, and to the government that which is reserved.

Atlantic and Pacific Railroad v. United States, 76 Fed. 186, 196;

United States v. Union Pacific Railroad, 160 U. S. 1, 32, 33;

Shields v. Ohio, 95 U. S. 319;

Wisconsin Railroad v. United States, 164 U. S. 190, 205;

United States v. Oregon Rd., 176 U. S. 47, 48.

The confirmatory act of March 2, 1896, requiring the railroad company to repay to the United States the government price of the lands, was passed in the interests of the railroad company, and has been fully accepted and adopted by the company, and the company is now estopped from denying its liability.

It cannot be doubted but that the act of March 2, 1896, was for the benefit of the Southern Pacific Company. This is apparent from the fact, as shown by Exhibit "A" to defendant's answer, that the lands were sold at a price largely in excess of the government value.

The answer alleges that the lands were so sold to *bona fide* purchasers. It is, therefore, obvious that the confirmation of the title alone will relieve the railroad company from the obligation to repay the purchase price, by reason of failure of title.

It is well settled that where an act is passed which is for the benefit, or in the interest of a corporation or person, it will be presumed that the act was passed at the request of such corporation, and that the company has accepted its provisions.

In taking the benefits of the act the company, of course, is charged with its burdens.

United States v. S. P. Rd., 117 F. 544.

In this case we are not, however, required to rely upon the legal presumption of acceptance, if that were necessary, but we have evidence in the record that the company did in fact accept the provisions of this act and claim its benefits.

The answer of the Southern Pacific Railroad Company and the trustees in its mortgage bonds, in the present case, relies upon and seeks to take the benefits of the act of March 2, 1896. The answer allges [Record 96]:

> "That prior to *March 2, 1896,* the defendant Southern Pacific Railroad Company duly issued, sold and delivered negotiable bonds secured by this last mentioned mortgage or deed of trust of the face value of more than $10,000,000 to *bona fide* purchasers thereof, who purchased the same in good faith, without notice of any claim or demand of the United States to or respectiong any of the said

lands, and each and all of said purchasers paid full value for the said lands, and were and are *bona fide* purchasers of the same."

The answer also contains further allegations showing that it had placed the lands beyond the reach of the court —facts which cause the act of 1896 to operate. [R. 96.]

NINTH.

The contention of appellants that the holders of its bonds alleged to be secured upon the lands in suit, are bona fide purchasers, is without merit.

(*a*) The alleged mortgages do not embrace these lands, but by their terms cover only *lands granted to the Southern Pacific Railroad Company by the acts of Congress of 1871 and 1866,* and these lands were not so granted.

(b) The adjusment act of 1887 protecting titles of *bona fide* purchasers (see 24 U. S. Stats. 556, Sec. 4), provides as follows:

> "That a mortgage or pledge of said lands by the company shall not be deemed as a sale for the purpose of this act."

It has been frequently determined by the United States Supreme Court in former litigations, with the Southern Pacific Railroad Company, that the aforesaid adjustment acts do not protect bondholders under the mortgages or deeds of trust set up in the answer of that company in the present suit.

United States v. Southern Pacific, 146 U. S. 570, 619.

Southern Pacific Railroad v. United States, 168 U. S. 1, 66.

Southern Pacific Railroad v. United States, 183 U. S. 519; and

Southern Pacific Railroad v. United States, 189 U. S. 447.

In all these cases the trustees of the mortgage bonds of the Southern Pacific Railroad Company were parties defendant and in all of them rights were asserted as *bona fide* purchasers of the lands in suit, by virtue of the mortgages or deeds of trust and in all of them that contention was denied.

TENTH.

That the Southern Pacific Railroad Company has or Claims to have a Right to Select other Lands as Indemnity for the Lands which are the Subject of this Suit, is not a Defense to this Bill.

(a) The Southern Pacific Railroad Company during the thirty odd years since the grant of March 3, 1871, was made to it, has not attempted to select indemnity lands for lands lost within its place limits, which it had a right to select, for them, but has attempted to hold as "place lands" those very valuable lands which were excepted from its grant situated in close proximity to large cities and towns.

It is stipulated in this case, as follows: [R. 132.]

> "It is further stipulated that within the indemnity limits of the grant to the Southern Pacific Railroad Company made by the Act of Congress of

March 3, 1871, and outside of the twenty mile limits, there now remain more than fifty thousand acres of surveyed public lands of the United States for which there has been no selection or application to select, made by said company."

This stipulation of fact disposes of the contention made by the railroad company that there are no other lands to select as indemnity for the lands described in the bill.

United States v. Southern Pacific Railroad Co., 117 F. 544;

United States v. Winona Railroad Co., 165 U. S. 463, 481, 482.

(*b*) Moreover, nothing is more firmly established than a naked right to acquire public lands cannot be than that a naked right to acquire public lands cannot be enforced against the United States in the courts by any judicial proceeding.

The United States did not guarantee any particular quantity of indemnity lands, or at any particular time, to the railroad companies, and in all the legislation the government retained political and judicial control over the disposition of the lands.

The courts have uniformly refused to enforce against the government any claim of title to particular lands, especially where the issue of patents for them involved the exercise of political or judicial power, or the determination of antecedent facts.

In United States v. Jones, 131 U. S. 1, at page 19, the court said:

> "We should have been somewhat surprised to find that the administration of vast public interests like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts—which it surely would have been if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide."

In the very recent case of Southern Pacific Railroad Company v. Bell, 183 U. S. 675, 690, the court adjudged that no right or title attached in the Southern Pacific Railroad Company to indemnity lands, until the lands had been selected by the railroad company and such selection approved by the Secretary of the Interior.

To the same effect are the decisions in

Hewitt v. Schultz, 180 U. S. 139;

Wisconsin Railroad v. Price County, 133 U. S. 496, 511;

Oregon Rd. v. U. S. 189; U. S. 103, 116.

It has uniformly been ruled that the action of the Interior Department in awarding patents to lands, or patents for inventions, cannot be controlled by the courts except where they err in law.

Gaines v. Thompson, 7 Wall. 347;

United States v. Schurz, 102 U. S. 378;

Butterworth v. United States, 112 U. S. 50;

United States v. Black, 128 U. S. 40;

Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

It follows from these principles that even if there were

no indemnity lands remaining in the Southern Pacific grant, that company could not enforce in the courts a right to any such lands, such action being a usurpation of the powers of the Interior Department.

(*c*) Indeed, in the recent case of Oregon Railroad v. United States, 189 U. S. 103, 115, the court said:

> "But the extent to which lieu lands could be required to supply such deficit in place limits, could not be properly or legally determined until there was an adjustment of the grant of lands in respect to place limits."

(*b*) Counsel for appellants erroneously contending as before pointed out that the Southern Pacific had not received the full quantity of lands promised to it in its grant, proceed to quote from United States v. Winona Railroad, 165 U. S. 482, giving the quotation as follows, at page 26 of appellant's brief:

> "But lastly and chiefly it does not appear from the record either that the railroad company received an excess of lands or has ever received (these lands included) the full quantity of lands provided in the grant."

Now the full quotation from the said opinion of the Supreme Court touching this matter, is as follows (pages 481, 482):

> "If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent,

> *it is sufficient to say that, first, the government has not asked any such decree;* second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued; but lastly, and chiefly, that it does not appear from this record either that the railroad company received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; *and further, that it does not appear that there were not within the granted or indemnity limits, lands which the company might have rightfully received but for this erroneous certification.*"

Italics are inserted in this brief to call attention to the part inadvertently omitted by counsel, as it seems to have been in the mind of the court in using the conjunction "and" that if it had appeared that there were other lands which might have been selected by the company, but which were not selected, that a recovery might have been had even in that case.

The stipulated facts in the present case that there are 50,000 acres of such lands open to selection by the Southern Pacific, removes from discussion the possible defense suggested in the opinion of the Supreme Court, and the further circumstance that the present bill does expressly seek as alternative relief, the recovery of the government price of the lands, and presents a suit clearly cognizable in equity upon other grounds, shows that the present case is in no wise controlled by the Winona case, as pointed out by Judge Ross in his opinion in 117 U. S. 544.

ELEVENTH.

For such of the lands as have not been sold by the railroad the Government is entitled to a decree, and for such as have been sold to bona fide purchasers, the Government is entitled to a judgement for $1.25 per acre.

See acts of Congress of March 3, 1887, and March 2, 1896;

United States v. Southern Pacific Railroad Co., 177 F. 544;

And numerous cases *supra.*

As declared in these acts of Congress and as pointed out in the opinion of Judge Ross, above mentioned, if it were not for the limitation of the liability of the railroad company to one dollar and twenty-five cents per acre, in the act of 1896, the government would be entitled to recover the full value of the lands, or the amount received by the railroad company upon a sale to any *bona fide* purchaser, but as the government has seen fit to donate the excess over and above one dollar and twenty-five cents per acre to the Southern Pacific Railroad Company, no relief is sought by this bill for such excess.

Respectfully submitted,

JOSEPH H. CALL,

Special United States Attorney.

APPENDIX.

ACTS OF CONGRESS.

ATLANTIC AND PACIFIC GRANT.

July 27, 1866 (14 Stat., 292).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

Section 1 incorporated the Atlantic and Pacific Railroad Company and provided for the construction and location of a line of railroad, as follows:

"Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route, as shall be determined by said company to a point on the Canadian river, thence to the town of Albuquerque, on the River Del Norte, and thence by way of Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

Sestion 2 grants a right of way, etc.

"SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the pur-

pose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided*,

further, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further,* That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'"

"SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same

are, hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

"SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein, are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred seventy-eight."

"SEC 11. *An be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

"SEC. 18. *And be it further enacted,* That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its con-

struction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

"SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

TEXAS PACIFIC AND SOUTHERN PACIFIC ACT.

March 3, 1871 (16 Stat. L., 573, 579).

"AN ACT To incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

Sections 1 to 22 of this act incorporated and made a grant of lands to the Texas Pacific Railroad Company.

Section 23 provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same

rights, grants and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

ACT OF CONGRESS OF MARCH 3, 1887.

(24 Stats. 556)

AN ACT to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad grants made by Congress to aid in the construction of railroads and hertofore unadjusted.

SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or re-conveyance to the United States of

all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so re-convey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to retsore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided,* That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also,* That he did not voluntarily abandon said original entry: *And provided further,* That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchesers, then to bona fide settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been

sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification of patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided,* That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided,* That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of

any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided,* That all lands shall be excepted from the provisions of this section what at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further,* That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation, or individual would be rightfully entitled."

Approved, March 3, 1887. (24 Stat., 556.)

ACT OF CONGRESS, FEBRUARY 12, 1896.

(29 Stat. 6.)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section four of an Act entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto the following proviso: *'Provided further,* That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser.' "

ACT OF CONGRESS OF MARCH 2, 1896.

(29 Stat. 42.)

"*Be it enacted, &c.,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress, and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

SEC. 2. That is any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons,

for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons, for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

Sec. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or per-

sons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified.

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See page 104

No. 1045.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD COMPANY;
CENTRAL TRUST COMPANY OF NEW YORK;
D. O. MILLS AND HOMER S. KING, AS TRUSTEES,
Defendants and Appellants,

VS.

THE UNITED STATES,
Complainant and Appellee.

Appellants' Reply Brief.

WM. SINGER, JR.,
Attorney for Appellants.

WM. F. HERRIN,
Counsel for Appellants.

FILED THIS ..... DAY OF ....., A. D. 1904.

.....
Clerk.

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vs.

THE UNITED STATES,

Complainant and Appellee.

Appellants' Reply Brief.

The "Statement" with which the "Brief for United States" opens, is more largely the expression of counsel's conclusions as to the effect of the evidence in view of his opinions of the law, than an uncolored statement of the facts.

We beg leave to repudiate the chapter of the "Brief for United States" written under the heading "Defendants' Contentions", and to refer to "Appellants' Brief"

on file herein as more aptly, and seriously, stating our contentions.

As to the chapter of the "Brief for United States" written under the caption heading "Mistakes of Counsel for Defendants", we have this to say:

In United States v. Winona &c R. R. Co., 165 U. S. 463-482, the Supreme Court had before it a grant of odd-sections for six sections in width on each side of the railroad in aid of which the grant was made (11 Stat. 195); which grant provided indemnity right to select from the odd-sections, within specified limits, "so much land * * as shall be equal" to the quantity of primary sections disposed of by the United States prior to definite location of the railroad. The court found that the lands in suit were erroneously certified to the Company (lands were certified, not patented, under that grant), but that the certification could not be canceled because of sales by the Company to persons whose title the Act of March 2nd 1896 had confirmed; and, considering the suggestion that the suit "may yet be maintained against the defendant railroad company for the value of the lands", the court said:

"If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent, it is sufficient to say that, first, the Government has not asked any such decree; second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued; but lastly, and chiefly, that it does not appear from this record either that the railroad company

received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; and further, that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that, if, simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified and which have since been disposed of by the Government to other parties, so that there is now no way of filling the grant, the Government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the Government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the Government to recover from the company the value of lands erroneously certified."

The sense of which, as we understand it, briefly stated, is: That the court was of opinion that the *money value* of the land could not properly be recovered from the Company without showing that it had already received (the lands in suit excluded) *the full quantity* granted by the Act; and the court inclined toward the view that *an action at law was the proper remedy.* As the Government price for all lands of the same class is equal, it sustained no loss, or injury, because recovery of those particular lands could not be had, unless, those particular lands included, the Company had received *an excess of quantity;* from which it follows that where lands have been erroneously patented to a railroad company under a grant of quantity, and the patents cannot be canceled because of the confirmatory provisions of the Act of March 2nd 1896, the proper remedy is to charge the quantity of land

thus patented against the quantity granted, in final adjustment—provided the Company has not yet been certified, or patented, the quantity of land granted.

The Southern Pacific grant at bar is of land "*to the amount*" of ten odd-sections per mile; and, like the grant before the court in the Winona case, it provides for selection of other lands "in lieu" of such primary lands as the United States shall have disposed of prior to definite location of the contemplated railroad.

The official "Land Office Report. 1875"., of which this court will probably take judicial notice, shows (p. 409) that the estimated quantity of land granted to the Southern Pacific Railroad Company by the Act of March 3rd 1871, is 3,520,000 acres, while the estimated quantity it will receive under that grant (because of sales, and other disposition of lands by the United States prior to definite location of the railroad), is but 3,000,000 acres. This report is now before this court, however, in case No. 956, between the same parties (Tr. Vol. 3, pp. 702, 703); and it precludes the possibility of a showing here that the Southern Pacific "has received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant" (Quotation from Winona decision, *supra*).

To bring the Southern Pacific within the spirit, as well as within the letter, of the Winona decision, we showed by the uncontradicted testimony of Jerome Madden, its land agent, that the Southern Pacific grant had not yet been finally adjusted; and that patents had not yet been issued for a large quantity of land to which the Company's right to patent stands approved (Tr. Vol. 2, p.

486). Mr. Madden was then asked to produce a statement of the quantity so approved but not yet carried to patent (p. 487)—and thereupon counsel for the United States gratuitously admitted that "the quantity called for by the preceding question of Mr. Singer exceeds 10,000 acres." (P. 488). As the quantity of land involved in this suit is not nearly equal to 10,000 acres, we accepted the admission, and pressed Mr. Madden no further.

On page 26 of our "Appellants' Brief" we referred to this admission in a three-line paragraph, a considerable portion of which three-line space is taken by the reference to "(Tr. Vol. 2, p. 488)" as the place where it is to be found. Counsel comes back with a chapter under bold, black caption-heading "Mistakes of Counsel for Appellants", under which, after so misquoting our reference to the admission as to omit therefrom "(Tr. Vol. 2, p. 488)", says "It was not in fact so stipulated"; and in proof of the charge quotes *another stipulation*, about a different matter, appearing at page 132 of the transcript.

In his "Brief for United States" in the case No. 956, now before this court, counsel (here and there) contended that the fact the Southern Pacific has not selected all indemnity land to which it is entitled, takes the Southern Pacific grant out of the rule in the Winona case (pp. 56, 57); which affords a pertinent suggestion that the stipulation under which counsel took cover to avoid effect of the admission to which we referred, was a stipulation given by us and not to us.

Assuming it to be satisfactorily shown, by the official report, the testimony of Mr. Madden and the admission of counsel on page 488 of the printed transcript, that because

of land sales made by the United States the Southern Pacific can never receive (these lands included) the quantity granted, and that the United States still holds a large quantity of land to which the Company is admittedly entitled to patent, we submit that this case is fairly within the rule in the Winona case that the value of the lands cannot be recovered from the Company in this case because here as there "it does not appear from the record either that the railroad company received an excess of lands, or has ever received (these lands included) the full quantity of lands provided in the grant."

It is true that the United States still holds a large quantity of land within limits of the Southern Pacific grant not yet selected or approved for patent, as well as a large quantity of such land which has been selected but has not been patented to that Company; but we fail to see the materiality of the distinction sought to be made between selected and unselected lands. In other words, the United States having in its hands lands to which the Southern Pacific is entitled to but has not been given patent, sufficient to supply the quantity transferred to the Company by erroneous patent, it strikes us as immaterial whether such withheld lands have or have not been selected or approved for patent, so long as patents have not been issued therefor.

This also answers the insinuation made on page 45 of the "Brief for United States", that we erred in correctly quoting a part without also quoting another part of the opinion in the Winona case.

We will now reply to the "Points" made by the "Brief for United States" in the order they are there presented.

FIRST.

The first point made is that the right of the defendants to object that this case shows no grounds of equity jurisdiction, was waived by their failure to demur.

Equity jurisdiction for cancellation of patents, appearing on the face of the bill, *was shown by the proofs not to exist* as to any of the lands sold by the Southern Pacific Railroad Company, because of the provision in the Act of March 2nd 1896 that no patent for such land shall be canceled; and an action to recover the value in money of the lands, cannot be joined with a suit to cancel patents for other lands **(Cherokee Nation v. S. K. Ry. Co., 135 U. S. 641; Scott v. Neeley, 140 U. S. 107).**

It is well settled that a party cannot disguise an action at law by colorable suggestions of fraud, accounting, or the like; that the court will look at the proofs, and if there be no proof of matters which make a case in equity, it will dismiss the bill; and that it is a duty of the court to dismiss the bill *sua sponte*, where *the proofs* fail to show proper grounds of equity jurisdiction, notwithstanding no objection to jurisdiction in equity was made by demurrer, plea or answer.

The proofs in the case at bar make it apparent that what is said in the bill about determining which are *bona fide* purchasers, quieting title, annulling patents and so forth, was suggested to give color of right to sue in equity, protect the bill against dismissal on demurrer, and by forcing the defendants to answer and proofs, lay foundation for the contention made at the Circuit Court hearing, and renewed here, that it was then too late for objection to the jurisdiction.

It will be born in mind that these defendants objected to the jurisdiction at the Circuit Court hearing; the briefs of both parties being, substantially, the same there as here.

In **Mills v. Knapp, 39 Fed. 592,** the plaintiff in his bill claimed (as in the case at bar) an exact sum, and the defendant pleaded to the merits. It was insisted that the defendant by pleading to the merits had lost the right of objecting for the first time to the jurisdiction of equity at the hearing. But the bill was dismissed, because the plaintiff had an adequate remedy at law. Blatchford, J. said:

"Besides this, the plaintiff, on the face of his bill has a plain, adequate, and complete remedy at law. * * No other equitable relief is asked. In such a case it is not necessary that the objection should have been taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked. Reynes v. Dumont, 130 U. S. 354; Kilbourn v. Sunderland, 130 U. S. 505. It is governed by the rule laid down in Lewis v. Cocks, 23 Wall. 466, where the court, finding the case to be an action of ejectment in the form of a bill in Chancery, ordered the bill to be dismissed, although the objection was not made by demurrer, plea or answer, or suggested by counsel; saying that, as it clearly existed it was the duty of the court *sua sponte* to recognize it, and give it effect. It results from these views that without inquiring into the merits of the case, the bill must be dismissed with costs."

To the same effect will be found **Litchfield v. Ballou, 114 U. S. 192.**

In **Lewis v. Cocks, 23 Wall, 466,** it was held that a party could not disguise an action of ejectment in a bill

by a colorable suggestion of fraud, accounting, etc., and use it in place of the common law remedy; that the court will look at the proofs, and if there be no proof of matters which would make a proper case of equity, it will disregard and dismiss the bill *sua sponte*, though there be no demurrer, plea, or answer setting up the objection to the court's jurisdiction. In that case the court, at page 469, said:

"Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain, adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisdiction is as old as the earliest period recorded in its history, (Spence, 408, 420,) * * * *

In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel; nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect. (Hipp v. Babin, 19 How. 278; Baker v. Bibble, Baldwin, 416.)

It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. Where the complainant had recovered a judgment at law, and execution had issued and been levied upon personal property, and the claimant under a deed of trust had replevined the property from the hands of the marshal, and the judgment creditor filed his bill praying that the property might be sold for the satisfaction of his judgment, this court held that there was a plain remedy at law; that the marshal might have sued in trespass, or have applied to the Circuit Court for an attachment, and that the bill must therefore be dismissed. Knox v. Smith, 4 How., 289. In the present case the bill seeks to

enforce 'a merely legal title.' An action of ejectment is an adequate remedy."

The case at bar is a common-law action of assumpsit to recover a debt of specific amount, for which there would be "a plain and adequate remedy at law", if there be such a debt. What is said in the bill about determining which are *bona fide* purchasers, and quieting titles and annulling patents, is simply suggested to give color of right to sue in equity. The *bona fides* of the sales is not questioned. Under the Act of March 2nd 1896, if sales were made to *bona fide* purchasers of patented lands, then their titles were confirmed, and they have no interest in litigating the question as to the liability of their vendor to the Government for the price of the lands; hence these purchasers could not be properly joined as defendants. They have got all they bargained for—a clear title to their lands.

If plaintiff has a lawful money demand against the defendant Company for the price of land it has sold to *bona fide* purchasers, the remedy is just as efficient at law as in equity.

In **Oelrichs v. Spain, 15 Wall, 227,** the court said:

"In the jurisprudence of the United States this objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. (Parker v. Winnepiseogee Co., 2 Black 551; Graves v. Boston Co., 2 Crouch, 419; Fowle v. Lardson, 5 Peters, 495; Dade v. Irwine, 2 How. 383.)

The 16th section of the Judiciary Act of 1789 provides 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;' but this is

merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate and complete;' or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity.' (Boyce v. Grundy, 3 Peters 215.) Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury."

There was no relation of trust and confidence between the plaintiff and the defendant corporation in the suit at bar, to be the foundation of a suit in equity.

In **Killian v. Ebbinghaus, 110 U. S. 573,** no objection to the jurisdiction of a court of equity was raised in the pleadings, but the bill was dismissed without prejudice on the ground that there was an adequate remedy at law. The court said:

"The case is similar to the leading case of Hipp v. Babin, 19 How. 271, which was dismissed by the Circuit Court on the ground that there was an adequate remedy at law. Upon appeal to this court the decree was affirmed. * * * And the court declared as a result of the argument, 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' See also Parker v. Winnepiseogee Co., 2 Black 545; Grand Chute v. Winegar, 15 Wall. 373; Lewis v. Cocks, 23 Wall. 466. And this objection to the jurisdiction may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel."

The bill in that case was dismissed for want of jurisdiction. It is a well established rule that consent cannot

confer jurisdiction; hence the bill was dismissed by the court of its own motion.

In **Hoey v. Coleman, 46 Fed. Rep. 221,** it was held that the objection that there is a plain and adequate remedy at law is jurisdictional, and that a bill must be dismissed where such remedy exists, although the objection has not been raised by demurrer, plea, or answer. The court said:

"Upon the authority of Shelton v. Platt, 139 U. S. 591, the present bill must be dismissed, because the case made is one in which there is a plain, adequate and complete remedy at law. It has been adjudged frequently by the Supreme Court, prior to the cases of Reynes v. Dumont, 130 U. S. 254, and Brown v. Iron Co., 134 U. S. 530, that the objection that there is plain and adequate remedy at law is jurisdictional, and should be enforced by the court of its own motion; but in those cases the court indicated that the objection should not be entertained in a case when the relief sought is of an equitable nature, unless it is raised by the defendant before he enters on his defense at large; that is, by a demurrer, or plea. The defendants have not raised this objection even by answer. * * *

"In the case of Allen v. Car Co., 139 U. S. 659, the Supreme Court dismissed a bill filed to restrain the collection of a tax, upon the ground that there was an adequate remedy at law, notwithstanding the objection was raised in that court in the first instance, and had not been taken by plea, demurrer or answer in the Circuit Court. In the opinion the cases of Reynes v. Dumont and Brown v. Iron Co., *supra*, are referred to, but the former rule, as declared in many adjudications, that the objection may be raised notwithstanding it has not been taken by demurrer or plea, is again applied."

In **Buffalo v. Town, &c, 85 Va. 222,** the court said:

"If a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction in the pleadings, and objection on that ground may be made at any time in any court."

In **Jones v. Bradshaw, 16 Grattan (Va.) 361,** Judge Robertson said:

"When the bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie), if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged, and the bill should be dismissed for want of jurisdiction."

Against this doctrine, the "Brief for United States", on page 13, cites a list of authorities, which will be considered here in the order stated there.

(a). The first case relied on by counsel for the United States, is U. S. v. S. P. R. R. Co., 117 Fed. 544. That is a decision by the same court, between the same parties, on the same contentions, as this case at bar; and there as here the case is pending on appeal to this court.

(b). The next case cited by counsel is Williams v. Monroe, 110 Fed. 322. In that case *the plaintiff*, not the defendant, objected to the jurisdiction. The court, after saying (p. 329) that "the objection that there is an adequate remedy at law should be taken at the earliest opportunity", held that "the jurisdiction of the court in this case is believed to be beyond dispute."

(c). The next case cited against us is Brown v. Lake Superior Co., 134 U. S. 530. There the court, remarking

that "He who asks equity must do equity", refused to allow defendant "to ignore its long acquiescence" and overthrow protracted litigation after extensive and costly proceedings carried out in reliance on its consent to and acceptance of the jurisdiction. The rule applied there is the law of that particular case—which has no parallel in the case at bar; for here there was no long acquiescence, protracted litigation, nor costly proceedings on the strength of consent to the jurisdiction.

(d). The next case cited against us is Insley v. United States, 150 U. S. 512. There the opinion starts out by saying that "The question in this case is whether the proceedings by *scire facias,* taken by the United States to enforce the forfeiture of McElroy's recognizance, operated to divest his title to the lands in dispute." The defendant contended that a certain judgment of the District Court of Kansas, affecting defendant's title to the property, rendered upon a writ of *scire facias,* was void because the laws of Kansas do not authorize proceedings by *scire facias.* The court, after saying "we do not find it necessary to determine whether a *scire facias* was a proper remedy or not," remarked that (p. 515) "even an objection that an action should have been brought at law instead of in equity, may be waived by failure to take advantage of it at the proper time." Nothing further is to be found in that opinion which has even the remotest bearing on the contention in support of which it is cited. Were the judgment void, it must forever so remain—hence it would seem immaterial at what time the objection came.

(e). Perego v. Dodge, 163 U. S. 160, next cited by counsel, sustains our contention, by the following reference, with approval:

"It was held in Lewis v. Cocks, 23 Wall. 466, that if the court, upon looking into the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect though not raised by the pleadings nor suggested by counsel."

(f). The last case cited against us is Kilbourn v. Sunderland, 130 U. S. 505. In that case there had been protracted litigation and several suits consolidated into one before the objection to the jurisdiction was taken. The judgment of the court was based on the ground that the legal remedy in the circumstances of the case would not be as efficient as the equitable. In the opinion of the court

"The parties stood in a fiduciary relation to each other * * * as to five of these purchases fraud is charged; * * * * the transactions were all parts of one general enterprise involving trust relations; (the claims) all sprang from a series of operations that required accounting on both sides, and the accounting was apparently complicated and difficult. There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law."

Here were all the favorite heads of equity jurisdiction; fiduciary relations, fraud, accounting and trusts. There is none of these in the case at bar.

The case of Perego v. Dodge (163 U. S. 160), hereinbefore referred to (par. e) as cited against us, was an appeal from the Supreme Court of Utah, and the decision was largely based on its Code of Civil Procedure. But in that

case it was not the defendant, but the plaintiff, who took exception to the jurisdiction. Mr. Justice Fuller, said:

"Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law."

He then added:

"Even a defendant who answers and submits to the jurisdiction of the court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time."

The last sentence above quoted is an *obiter dictum,* as there was no case before the court where a defendant, having failed to object to the jurisdiction by demurrer, or answer, had first raised the question on appeal. In the cases cited, however, the objection was first taken on appeal. Further on in that opinion the Chief Justice said:

"It was held in Lewis v. Cocks, 23 Wall. 466, that if the court upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings and suggested by counsel. To the same effect is Oelrichs v. Spain, 15 Wall. 211."

So even when first suggested on appeal the court will dismiss a bill where there are "found none at all of the matters which would make a proper case in equity." If the defendant corporation is indebted to the Government for the value of the lands it has sold, then the plaintiff has an efficient remedy by an action at law.

In **New York v. Memphis etc., 107 U. S. 214,** the court said:

"We have lately decided, after full consideration of the authorities, that an assignee of a chose in action, on which a complete and adequate remedy exists at law cannot, merely because his interest is an equitable one, bring suit in equity for the recovery of the demand. Hayward v. Anderson, 106 U. S. 672. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee and held for the benefit of cestuis que trust. * * * In view of the early enactment by Congress in the sixteenth section of the Judiciary Act (Rev. Stat. 723), declaring, 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law,' the rule laid down in Hayward v. Andrews (supra) is entitled to special consideration from the courts of the United States. This enactment certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

The case at bar does not present a single element of equitable jurisdiction.

The seventh amendment to the constitution declares that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right cannot be impaired by blending a claim properly cognizable at law with a demand for equitable relief.

In **Scott v. Neely, 140 U. S. 107,** Mr. Justice Field said:

"The constitution in its Seventh Amendment declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact. In the case before us the debt due the complainant was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal courts. * * * This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had in law'; and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

In Scott v. Neely the question of equitable jurisdiction seems first to have been raised in the appellate court.

In **Bussard v. Houston, 119 U. S. 352,** Mr. Justice Gray delivering the opinion of the court, said:

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side * * * In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort, or for money had and received."

To the same effect will be found **Ambler v. Choteau, 107, U. S. 586; Carter v. Allen, 149 U. S. 451; Atlanta v. Western R'y, 50 Fed. Rep. 790.**

SECOND.

The second point made by the "Brief for United States" is, that the lands in suit were excepted from the Southern Pacific grant, because those lands were within claimed limits of the Jurupa Rancho (hence *sub judice*) at date the Company's grant attached.

We do not question the rule of law, that lands covered by a Mexican Grant claim of specific boundaries, *sub judice* at date a railroad land-grant would otherwise attach, except such land from the railroad grant; *but we say that the lands in this suit were not within claimed limits of the Jurupa Rancho at any time.*

As shown in our "Appellants' Brief", pages 3 to 14, Bandini asked confirmation of his full claim, defined the boundaries of his Jurupa Rancho claim in his petition, no person disputed or denied the boundaries thus defined, each of the several decrees confirmed his claim to the boundaries defined, and the patent follows those decrees;

making it apparent that Bandini got what he asked for, and all he asked for, *or at any time claimed.*

No controversy, or dispute, as to claimed limits, or confirmed boundaries, was presented to the United States Commissioners, or to the District Court. To the contrary, the several decrees confirm, and the patent conveys, the "Jurupa" as claimed and prayed for—and the lands in suit are not within that patent. In other words, the lands patented as the "Jurupa" are the identical lands claimed, prayed for, and confirmed as the "Jurupa"; hence to say that the lands in suit are not embraced by the patent, is to say that they are not and never were within claimed limits of the "Jurupa."

The contention that these lands were within claimed limits of the "Jurupa", is based solely on the fact that they are covered by a map made by Reynolds; but, as shown in our "Appellants' Brief", pages 3 to 14, the *status* of these lands in suit was at no time in anywise affected by the making, or existence, of that map.

The Act of July 23rd 1866, cited by counsel on page 20 of his brief, is inconsequential here. As shown on pages 3 to 14 of our opening brief, no lawful survey of the "Jurupa" could be lawfully made until the claim had been "finally confirmed"; and, further, the survey was required to follow the final decree of confirmation. Final decree in the "Jurupa" case was not made until March 2nd 1875, pursuant to Mandate of the Supreme Court (Tr. Vol. 2, p. 507)—long after the Reynolds survey; which survey, the Commissioner of the General Land Office found "discarded the plain requirements of the (District Court) decree." (Tr. Vol. 1, p. 331).

Counsel suggests that may be there was no appeal from the District Court decree—but this requires no further reply than the foregoing reference to the Supreme Court Mandate.

THIRD.

The third point made by the "Brief for United States", involves three propositions; namely: That this suit is maintainable as a suit (a) to quiet title to lands, (b) to cancel patents for lands, and (c) for alternative relief in money judgment.

(a). It cannot be maintained as an action to quiet title because, as shown by the pleadings and proof, *the defendants hold the legal title;* whereas plaintiff must hold the legal title, to maintain a suit to quiet title **(Dick v. Foraker, 155 U. S. 413-415** and cases cited; **Van Drachenfels v. Doolittle, 77 Cal. 296; Harrigan v. Mowry, 84 Cal. 467).**

(b. c.). It cannot be maintained as a suit to cancel patents, or as an action to recover a money judgment, for the reasons run out in subdivisions II and III of our "Appellants' Brief."

FOURTH.

The fourth point presented by the brief under reply is that the Act of March 2nd 1896 conferred special equity jurisdiction upon the Circuit Courts to confirm titles of *bona fide* purchasers and render *money judgments* against railroad companies for the value of lands.

To say that the Act of March 2nd 1896 conferred equity jurisdiction on the Circuit Courts to render judgments in money for the value of lands erroneously patented to

and sold by railroad companies, is to say that those courts did not theretofore have such jurisdiction; for if such jurisdiction was at the time already possessed by those courts, then it cannot be said that such jurisdiction was conferred upon them by the Act of March 2nd 1896.

The only cases cited by counsel in support of this contention which have any bearing on it, are the decision of the Circuit Court in this case (117 Fed. Rep., 544), and the decision in United States v. Oregon Railroad, 122 Fed. Rep. 541. The decision in the last-mentioned case, on demurrer to the bill for no equity shown, overrules the demurrer in the following very doubtful language:

"It is true that in the particular case the demand is for a money decree, and this would be true in any case brought in pursuance of the request of the Secretary of Interior upon a claim made by a bona fide purchaser. The Act authorizes such suit, *and is the only authority for a proceeding to recover the price of the lands erroneously patented.*"

The other decisions cited relate solely to the authority of federal courts to recognize State statutes of right, modifying or enlarging equity jurisdiction.

It will be observed that the Act of March 2nd 1896, contains neither suggestion nor requirement that the money judgment contemplated be obtained in a *court of equity.*

The seventh amendment to the constitution declares that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right cannot be impaired by blending a claim properly cognizable at law with a demand for equity relief.

In **Scott v. Neely, 140 U. S. 107,** Mr. Justice Field said:

"The constitution in its Seventh Amendment declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact. In the case before us the debt due the complainant was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal Courts. * * * This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had in law; and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

In **Bussard v. Houstan, 119 U. S. 352,** Mr. Justice Gray delivering the opinion of the court, said:

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side. * * * In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort, or for money had and received."

To the same effect will be found **Ambler v. Choteau, 107, U. S. 586; Carter v. Allen, 149 U. S. 451; Atlanta v. Western R'y, 50 Fed. Rep. 730.**

FIFTH.

The fifth point made by the brief under reply is, that "This bill is cognizable in equity as one brought to avoid multiplicity of suits."

As the United States is demanding payment of a definite sum from the defendant Company *only*, for certain lands alleged to have been erroneously patented to it, shown by the proofs to have been sold to persons whose title is confirmed by the Act of March 2nd 1896, it is hard to see where the multiplicity would come in. The Government could not split up its claim and bring a separate action against that Company for the price of each tract sold—and no demand is made against any other defendant; but the whole demand would have to be stated in one action at law. It is immaterial how many purchasers there were. They could not be parties because, their *bona fides* being admitted, they had no interest in the litigation. They got all they bargained for.

In **Northern Pacific R. Co. v. Cannon, 46 Fed. 232,** the court said:

"Where a bill fails to show any grounds of equitable relief the defect is one of jurisdiction, and this court cannot proceed to determine the merits of the controversy. Oelrichs v. Spain, 15 Wall. 227; Litchfield v. Ballou, 114 U. S. 190."

It would be as absurd for the United States to bring separate actions against the Southern Pacific for each tract of land sold by it, as for a merchant to bring separate actions for each item of a customer's bill.

Herman on Estop. and Res. Ad., Secs. 220, 221, and 222, says:

"A party cannot divide and recover in parts, in different actions, a claim which in its legal nature is indivisible. * * * That a party shall not be allowed to split up an entire and indivisible claim and recover upon it in fragments in different actions, is itself palpably reasonable and is well enough settled. A party should not be vexed with a multitude of suits for one and the same cause of action. There can be no reason given why he should be, but sufficient and numerous reasons why he should not. * * * If a party divide a single and entire cause of action once, to what limit is there, but the caprice and will of the party, to endless divisions? For what depends upon the mere caprice or will of an adversary may be said to be without limit. * * * To allow a single claim to be divided and recovered in parcels would be instituting an unreasonable doctrine that would necessarily lead to vexatious and endless litigation. To effectually prevent this, the law wisely holds that a party cannot recover in parts a claim which is in its legal nature indivisible. * * * So a judgment, recovered against one of two wrong doers, is an estoppel to an action by the plaintiff against both. Thus, where a bed and quilts were taken at the same time and by the same act, a recovery in trover for

the quilts was held to be a bar to a recovery in trover for the bed. * * * Where goods are sold, services rendered, or money received, under such circumstances that the different items while occurring at different times are but one transaction, the cause of action will be entire, and a recovery for any part will be conclusive against the right to sue for the balance. * * * The doctrine is settled beyond controversy that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole, or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, ensuing either upon a contract, or from a wrong, cannot be divided and made the subject of several suits, and if several suits be brought for different parts of the claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in other suits."

If the United States has a lawful demand against the Southern Pacific for lands erroneously patented to and sold by it, such demand is entire and indivisible, and there can be no multiplicity of suits growing out of it; nor have the purchasers any concern in such demand.

It is absurd to say that this suit avoids multiplicity of suits otherwise to be brought by *bona fide* purchaser defendants against the United States. The Act of March 2nd 1896 prescribes the procedure for them—and it is not to bring suit against the United States.

SIXTH.

The sixth point made by the brief under reply is, that this suit is cognizable in equity as one to establish a trust holding of the lands if not sold, and a trust holding of the proceeds thereof if sold.

This point is clearly an afterthought; for there is neither allegation in the bill that a trust ever existed, nor prayer for decree establishing a trust.

The complainant relies, for the recovery sought, on the provisions of the Acts of Congress of March 3rd 1887, February 12th 1896, and March 2nd 1896. These Acts provide for two kinds of suits, only; one to cancel patents, and the other to recover a money judgment against patentee under a patent erroneously issued for lands sold to *bona fide* purchasers. These Acts do not create a lien upon moneys received from the sale of such lands; nor do they in anywise establish a trust in such moneys.

The Act of March 3rd 1887, provides that

"The Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payments as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount."

The amendment to this Act of February 12th 1896, provides that where *bona fide* purchasers have paid the company less than the government price of similar lands, the amount demanded from the company shall be the amount paid to it by such purchasers. This amendment, construed together with the Act of which it is an amendment, does not change the effect of the original Act, except as to the amount to be demanded from the company in such special case.

The Act of March 2nd 1896, provides that

"The Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof."

Section 3 of the same Act provides that

"The Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

An authorization to bring suit for "an amount equal to the government price of similar lands," or "for the value of" the lands sold to *bona fide* purchasers, is neither authority nor direction to sue for the identical moneys received from the sale of the lands, nor for a decree establishing a trust in or a lien upon such moneys. If any remedy at all is afforded to the Government against the defendant by these provisions, it is for the recovery of a simple money judgment, enforcible against any of its assets subject to the lien of a judgment.

In the case of **United States vs. Winona etc. R. Co., 165 U. S. 480, 482,** the Supreme Court, construing the Act of March 3rd 1887, said:

"The plain intent of this section is to secure to him (the *bona fide* purchaser) the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government *a simple claim for money against the railroad company* * * * *it may be doubtful whether for*

the mere purpose of recovering money an action at law must not be the remedy pursued."

It is not alleged that the moneys realized from those sales constitute a separate fund in the hands of the defendant to which a lien could attach or in which a trust could be declared; nor does the bill show that defendant at any time treated the moneys realized from the sale of those lands differently from other moneys realized from the sale of lands by it, or that such moneys were ever kept separate from moneys received from the sale of other lands.

Jones on Liens, Sec. 28, says:

"Equitable liens have commonly been regarded as having their origin in trusts. Perhaps they are better described as analogous to trusts. Remedies at law are for the recovery of money. Remedies in equity are specific. * * * It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property rights nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, in addition to the personal obligation, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien', and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing."

Again, **Sec. 34, Jones on Liens,** says:

"It is essential to an equitable lien that the property to be charged should be capable of identification, so that the claimant of the lien may say, with a reasonable degree of certainty, what property it is that is sujbect to his lien. Though possession is not necessary to the existence of an equitable lien, it is necessary

that the property or funds upon which the lien is claimed should be distinctly traced, so that the very thing which is subject to the special charge may be proceeded against in an equitable action, and sold under decree to satisfy the charge. A fund is not thus traced when it has gone into the general bank account of the recipient, or after it has been mixed with funds from other sources. Money which has been intermixed with other money cannot be the subject of an equitable lien after the money itself, or a specific substitute for it, has become incapable of identification." (Citing Payne vs. Wilson, 74 N. Y. 348; Grinnell vs. Suydam, 3 Sand. (N. Y.) 132; Drake vs. Taylor, 6 Blatchf. 14).

The moneys received from the sale of these lands having been mixed with moneys received from the sale of other lands at the time of their receipt, and many years, having passed since receipt of such moneys, it would be unreasonable for a court of equity to declare a trust in or attempt to create a lien upon, such moneys. The only relief (if any) which could be reasonably granted plaintiff, is a money judgment.

Story's Equity Jurisprudence, Sec. 794, (13th Ed.), states the rule as follows:

"It may be stated as a general proposition, that for breaches of contract, and other wrongs and injuries cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation or damages when these constitute the sole objects of the bill. For whenever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury than by the conscience of an equity judge. And indeed the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law."

And at **Section 794a** the same author says:

"So strictly has the rule been construed, that it has been thought that, even in cases where no remedy would exist at law—as for example in cases where a trustee by a breach of his trust has injured the property—a Court of Equity would not award damages therefor."

Pomeroy's Equity Jurisprudence, Sec. 178, also states the rule to be that:

"Whenever an action at law will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed; nor because the case involves or arises from fraud; nor because a contribution is sought from persons jointly indebted; nor even to recover money held in trust, where an action for money had and received will lie."

In the case of **Crocker v. Rogers, 58 Me. 342,** the court said:

"The case in principle is not unlike that of Russ v. Wilson, 22 Maine, 207. The object in that case, as in this, was to recover a sum of money, which it was averred was in the hands of the defendant, and which the plaintiff claimed, in equity and good conscience, belonged to him, and for an account. The plaintiff claimed that his remedy was in equity, because the case was one of trust. But the court answered that it is not every case of trust that is cognizable in equity; and trusts embrace a wide field, and that in most cases, a remedy may be sought by a suit at law, and much more appropriately than in equity; that proceedings at law are precise and direct to the object in view, and are simple and expeditious; while the proceedings in equity are latitudinary, multifarious, dilatory, and often vexatious; that various pretenses are often resorted to in order to uphold jurisdiction in equity, but that such pretenses should not be listened to with too much facility; that to yield

too inconsiderately to such pretenses, would, in the end, pervert justice, and render legal proceedings deservedly odious."

In the case of **Piscataqua F. & M. Ins. Co. vs. Hill, 60 Me. 184,** the court said:

"The whole substance of the bill is a complaint against William Hill, defendant, for breach of trust as treasurer. That breach, as the bill shows, is a failure on his part, with or without the assent of the directors, to account for the property and funds intrusted to him, and in his disposal of them to others, or conversion of them to his own use. The wrong is fully accomplished, and the only relief now to be obtained is compensation as damages. For this there is a full and adequate remedy at law." (See also Caleb v. Hearn, 72 Me. 232.)

In **Gaines vs. Miller, 111 U. S. 397,** it was held:

"Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received (Citing a list of authorities). The remedy at law is adequate and complete."

Clark on Contracts, page 764, under heading "Money received for the use of another," says:

"Whenever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay the latter, and the obligation may be enforced by assumpsit."

See also, **Lacombe vs. Forstall's Sons, 123 U. S. 570; Mills vs. Knapp, 39 Fed. Rep. 592; Litchfield vs. Ballou, 114 U. S. 192.**

As shown in our opening brief (subdivision III) if the United States has a lawful demand against the Southern

Pacific for the value of lands erroneously patented to and sold by it, the remedy is assumpsit, at law.

SEVENTH.

The seventh point is, that a court of equity having taken jurisdiction of a suit on ground pertaining to its jurisdiction, it will retain jurisdiction "even to granting legal remedies".

As shown on pages 24 and 25 of our opening brief, this court's jurisdiction on grounds of discovery ended with the filing of defendants' answer; equity jurisdiction for cancellation of patents, appearing on the face of the bill, is shown by the proofs not to exist; hence the bill should have been dismissed *sua sponte* for no equity, in view of the proofs.

EIGHTH.

This point is, that in making the Southern Pacific land-grant Congress expressly reserved the right and power to alter, amend or repeal the Act making the grant;. and that the Acts of March 3rd 1887, and March 2nd 1896, were passed in pursuance of such right and power to alter, amend and repeal.

We say of this reserved power of Congress to "alter, amend or repeal", that (1) it relates to the *construction and operation of the railroad* and not to the land-grant; that (2) were it true this reserved power relates to the land-grant, still the Act of 1887 and 1896 constitute no exercise of such reserved power, *because those Acts relate only to lands not granted;* and that (3) the provisions of the Act of March 2nd 1896, cannot be enforced against

this defendant Company—if for no other reason because it was not a party to the enactment.

(1). The provision relied on for this reserved power of Congress (14 Stats. 292, Sec. 20) reads as follows:

"Sec. 20. And be it further enacted, That the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend or repeal this Act."

To say that recovery of $1.25 per acre from this defendant Company for lands in suit, erroneously patented to and sold by it long after the railroad was constructed and accepted by the United States, and while the United States was receiving satisfactory use of the railroad in all ways contemplated, "will promote the public interest and welfare *by the construction of said railroad* and telegraph line and keeping the same in working order", is too absurd to discuss or consider.

(2) Were it in anywise true that Congress, in proper exercise of reserved power to alter, amend or repeal the land-grant, could by enactment make this defendant Company debtor unto the United States for lands granted by the Act under consideration, still Congress could not in the lawful exercise of that reserved power as such, declare this defendant debtor unto the United States for *other and different lands* than those contemplated by the granting Act; and here it is claimed, and held, that the

lands in suit were not granted by, but were excepted from, the granting Act.

Neither the Act of 1887 nor the Act of 1896 relate to lands granted to this defendant Company, but, on the contrary, each manifestly relates to lands not granted to it. The Act of March 3rd 1887 (24 Stats. 556,) after requiring the immediate adjustment of railroad land-grants provides:

"That if it shall appear, upon the completion of such adjustment, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any Company claiming by, through or under grant from the United States * * * it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification or other evidence of title theretofore issued for such lands, and to restore the title thereof to the United States." (Sec. 2).

Having canceled the patent, and restored the title to the United States, Section 3 of the Act provides that persons who purchased "in good faith * * shall be entitled to the land so purchased", and after canceling the patent and recovering the land the Attorney-General is directed to collect $1.25 per acre from the railroad company. It is respectfully submitted that cancellation of erroneous patents and restoration of title to the United States, would extinguish all obligation of the railroad company arising out of its attempted sale of the land; and having recovered the land, Congress would be powerless to recover, or create, a demand against the railroad company for the value of the land. In other words, the

United States is not entitled to both the land and the value of the land.

(3), The proof shows that most of the defendant Company's land sales were made prior to March 3rd 1887, that all those sales were made prior to March 2nd 1896, and that all the patents were issued prior to March 2nd 1896. The Act of 1887 related to sales theretofore made, and the Act of 1896 related to patents theretofore issued and lands sales theretofore made. The Act of March 2nd 1896, is declaratory and summary—and the operation of such statutes must be *in futuro*.

Sedgwick on Stat. and Const. Law, 188, says:

"A statute that * * creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective."

Besides each of these Acts, alike, fixes the amount to be paid by railroad companies at $1.25 per acre for lands erroneously patented to and attempted to be sold by them; *and this without regard to whether those companies received a greater or lesser price than* $1.25 *per acre.*

The provisions of this Act confirming titles was *ex parte* and gratuitous; nor was such confirmation *on condition* that the railroad companies pay the United States anything—the confirmation was absolute and unconditional. That Congress has the right, by legislative enactment, to confirm the titles, is admitted; but Congress is without constitutional power to adjudge or decree that railroad companies shall, because of such confirmation, be debtors of the United States. Whether the railroad companies are debtors of the United States, and if

they are in what amount, are questions for the judiciary to determine. If Congress had the power to impose a debt of $1.25 per acre on railroad companies, it had equal power to impose a debt of $1000 per acre. This Act is an attempt, by retroactive legislation, to establish a debt and adjudge the amount thereof; it attempts usurpation of judicial authority; it is an arbitrary sentence to pay, passed without any hearing. The right to be tried by the "law of the land" is as old as Magna Charta.

In Cooley on Constitutional Limitation (III), page 124, it is said:

"To compare the claims of parties with the law of the land before established, is in its nature a judicial act. * * To pass new rules for the regulation of new controversies is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future they violate the definition of law as 'a rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

In the Appropriation Act of 1870, there was a proviso that "no pardon by the President should be admissible as evidence in the Court of Claims." It was decided to be repugnant to the Constitution, as an attempt by Congress to exercise judicial power. In **United States v. Klein, 13 Wall. 147,** Mr. Chief Justice Chase, in delivering the opinion of the court, said:

"We must think that Congress inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish."

Discussing retrospective laws, **(Cooley, p. 455)** says:

"So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment."

In **Medford v. Learned, 16 Mass. 215,** a pauper had been supported by a town. Afterward the pauper's fortune improved, and the Legislature passed a law giving a town the right to recover from the pauper money expended in his behalf. Parker, Chief Justice, delivering the opinion, said:

"If it be true that this statute, instead of providing a remedy for an existing contract, must be construed to create a debt, or obligation, on a consideration which has passed, and which was not of itself a legal foundation for a promise, it would seem very clear that the statute was enacted improvidently, and that it could not have the intended operation. * * For no legislator could have entertained the opinion that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act declaring him one."

There was no contract existing on March 2nd 1896, creating an obligation on the part of the defendant Company to pay the plaintiff any sum for the lands it had sold. The Act of that date was an encroachment on the judicial department.

In **Union Pacific R. Co. v. U. S., 99 U. S., 760,** Mr. Justice Field said:

"To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power—and all such

power with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country. In the case of The Commonwealth v. Proprietors, &c., a corporation of Massachusetts, the Supreme Court of the State, speaking in reference to a contract between the parties, uses this language. 'Each has equal rights and privileges under it, and neither can interpret its terms authoritatively so as to control and bind the rights of the other. The Commonwealth has no more authority to construe the character than the corporation. By becoming a party to a contract with its citizens the Government diverts itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same situation as a private individual. If it were otherwise, the rights of parties contracting with the Government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt, or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belong exclusively to the judicial department of the Government. The legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers, which would be contrary to the elementary principles of our Government, as set forth in the Declaration of Rights, 2 Gray 350.

The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

See also, **Pryor v. Downey, 50 Cal. 388; Ex parte Shrader, 33 Cal., 280.**

If the Legislature cannot construe a contract between the Government and an individual, *a fortiori* it cannot create, of its own will, such a contract.

In 1873 Congress authorized a suit against the Union Pacific Railroad Company and others. Mr. Justice Hunt, in delivering the opinion of the Court dismissing the bill on demurrer, said **(11 Blatchford 392)**:

"IV. The United States is the plaintiff in this suit, and the question arises, Is there a right of action in the United States for the causes thus specified, or can a right to recover for such cause of action be given to the United States by an Act of Congress? Congress may authorize its Attorney-General to institute suits to recover damages due to the United States, or to redress wrongs which are legally wrongs to the United States, but its action can scarcely create such damages, or cause acts to be wrongs to the United States which are, in their nature, wrongs to another. The United States cannot convert to itself the property of another, by its own declaration, in its own name, against A to recover a debt he may owe to B. Moneys recovered by the United States in such an action, like its other funds, will go into its general treasury, and form a part of its resources, to be disposed of according to law. So, if any individual has committed a breach of trust, or been guilty of fraud in discharging his duties as Agent of the Union Pacific Railroad Company, the cause of action to redress such wrong and to recover damages therefor, and the damages themselves, when recovered, belong to the corporation. The suit for such redress must be in the name of the corporation, as plaintiff. As a general rule, and under ordinary circumstances, no other party can be such plaintiff, and an authority by Congress to the Attorney-General to commence such action in the name of the United States, is valueless. Congress cannot thus appropriate

to itself what belongs to another. To give effect to such an act would be to deprive one of his property without due process of law. I do not doubt the power of Congress over the remedy to redress alleged wrongs—in other words, its power to regulate the conduct of suits, or to prescribe the form of action. But it cannot, under the form of regulating the remedy, impair contracts, or dispose of rights of property. It cannot itself adjudge that moneys are due to the United States, and by such judgment give authority for their collection."

This decision was affirmed in **98 U. S. 606;** where the Supreme Court said:

"The first suggestion of the legal mind on this inquiry is, that it will not be presumed, unless the language of the statute imperatively requires it, that Congress, by a retrospective law, intended to create any new rights in one party to the suit at the expense, or by the invasion of the rights, of other parties; or, where no right of action was founded on past transactions existed, that Congress intended to create it."

The United States had no right of action against the defendant for the price of these lands prior to March 2nd 1896; and if plaintiff now has a right of action in respect to them, it was created by the Act of that date. In other words, Congress, by its mandate, directed the courts to adjudge that the defendant was a debtor to the United States for the lands. By ratifying the sales of land Congress could not make the United States the creditor of the defendant corporation, or of its vendees.

The essentials of a contract to pay the sum demanded are wanting; *sufficient consideration and assent.*

Sec. 1, Vol. 1, Parsons on Contracts, says:

"A promise for which there is no consideration cannot be enforced at law. This has been a principle of the common law from the earliest times. It is said to have been borrowed from the Roman law. The phrase '*nudum pactum*'—commonly used to indicate a promise without consideration—certainly was taken from that law."

The plaintiff's contention is that Congress, having confirmed the sales of land erroneously patented, a right of action accrued to plaintiff for the value of the land, because it was a benefit to the defendant. The Act of March 2nd 1896 was, it appears, a purely gratuitous Act. The Railroad Company was simply passive. Even if there had been an express promise to pay the price made after the passage of the Act, no legal obligation would have resulted from it. It would have been a *nudum pactum* based on a past consideration, and could not have been enforced. A past consideration is not regarded in law as a valuable consideration; it is simply a gratuity.

Sec. 16, Vol. II, Parsons on Contracts, says:

"It may be stated, as a general rule, that a past or executed consideration is not sufficient to sustain a promise founded upon it, unless there was a request for the consideration previous to its being done or made. This request should be alleged, in a declaration which sets forth an executed consideration, as that on which the promise is founded that is sought to be enforced. Without such previous request a subsequent promise has no force." etc.

In the case at bar there was neither a promise nor a request from the defendant. Of course where there is no sufficient consideration to support an express promise, a promise will not be implied.

In **Eastwood v. Kenyon, 11 A. & E. (39 E. C. L.) 411**, the subject was examined at length by Lord Denman, Chief Justice, who said:

"Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not said to have been at the request of the defendant, nor even of his wife while sold (though if it had, the case of Mitchinson v. Hewson, 7 T. R. 348, shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money."

In that case it was held that a pecuniary benefit, voluntarily conferred by the plaintiff and accepted by defendant, is not such a consideration as will support an action of assumpsit on a subsequent promise by the defendant to reimburse the plaintiff. Of course the case would be still stronger against the plaintiff where there is no promise.

It is not alleged there was any agreement, either before or after the Act of confirmation, by which the parties contracted that the defendant Company was to indemnify the plaintiff for confirming the titles of the purchasers to the land. The constituent elements of a contract were wanting here; neither an agreement, nor a valuable consideration.

Vol. 1, Chapt. 1, Addison on Contracts, says:

"There is no contract, unless the parties thereto assent; and they must assent to the same thing in the same sense * * * But a contract requires the assent of the parties to an agreement,

and this agreement must be obligatory, and as we have seen, the obligation must, in general, be mutual. This is sometimes briefly expressed by saying that there must be 'a request on the one side, and an assent on the other.'"

In **Jackson v. Galloway, 35 E. C. L. 34, Bosanquet, J.,** said:

"A request on one side, coupled with an assent on the other, is Lord Doke's aggregatio mentium which constitutes an agreement."

It is immaterial that some benefit may have accrued to the defendant company from the act of confirmation. The act could not per se create a contract without defendant's consent; nor would the law imply a contract because the defendant may have profited by it. A favor conferred implies no legal obligation to return the favor. It is a well established principle of jurisprudence that neither an individual nor a Government can of his or its own will impose a legal obligation on a party without that party's consent. If so, men would be reluctant to accept benefits. The acceptance of a benefit creates no debt. Liabilities cannot be forced on people. The only exception to the rule is the maritime doctrine of salvage where one volunteers to save a ship.

The case of **Falcke v. Scottish Imperial Ins. Co., Law Reports, Chancery Div., Vol. 34, p. 234,** (1887, 50 Vic.) is an authority in point that A, by doing an act for the benefit of B without a request, cannot make himself B's creditor. In the case cited a party had paid a premium on a life policy for the benefit of the insured that saved it, yet it was held that as he was a volunteer he

could not recover what he had paid. In that case Cotton, L. J., said (p. 241):

"Now let us see what the general law is. It is not disputed that if a stranger pays a premium on a policy that payment gives him a lien on the policy. A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property or such payment. If he does work upon a house without request he gets no lien on the house or the work done. If the money has been paid or the work done at the request of the person entitled to the property, the person paying the money or doing the work has a right of action against the owner for the money paid or for the work done at his request. If here there had been circumstances to lead to the conclusion that there was a request by Falcke that this premium should be paid by Emanuel, then there would be a claim against Falcke or his representative for the money and I do not say that there might not be a lien on the policy. But in my opinion there is no evidence upon which we should be justified in coming to the conclusion that there was any request expressed or implied by Falcke to Emanuel to pay this money. An express request is not suggested. Was there an implied request? I think that in a case of this sort, when money is paid in order to keep alive property which belongs to another, a request to make that payment might be implied from slight circumstances, but in my opinion there is no circumstances here in evidence from which such a request can be implied."

And in the same case, at **page 248**, Bowen, L. J., said:

"I am of the same opinion. The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any

obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

There is an exception to this proposition in the maritime law. I mention it because the word 'salvage' has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

That a mere volunteer cannot, of his own will, make himself a creditor, see **Lampleigh v. Brathwait, 1 Smith's Leading Cases, 167.**

There are no circumstances in this case from which a request, or promise, can be implied.

Black's Law Dictionary defines "Privity of Contract" as:

"That connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between plaintiff and defendant in respect of the matters sued on."

The Act of March 2nd 1896, was entirely *ex parte*, and not based on agreement. The United States would have

had an equal right to confirm the titles of purchasers without any request, or promise, and then sue them for the price of the land. (See **Lampleigh v. Brathwait, 1 Smith's Leading Cases, 167).**

Wharton on Contracts, Sec. 784, 809, says:

"We have already seen that privity, or reciprocal recognition, is essential to establish a contractual relation. Since the suit on a contract cannot be sustained unless there be a contractual relation between the parties, it follows that no one can sue on a contract to which he was not a party. It would in fact be destructive to society if strangers could intervene and undertake litigation in accordance with their own interests and tastes; and such intrusion can only be prevented by the right application of the rule that contracts can only be sued on by parties. * * *

Not only is the assent to a contract of the party charged, necessary to bind him, but this assent must be coincident with the formation of the contract. As a rule, a party to be made liable on a debt must assent to such liability. 'A cannot by paying X's debts unasked', says Sir W. Anson, 'make X his debtor', and he adopts as settled by high authority the rule that a man cannot of his own will pay another's debt without his consent, and thereby convert himself into a creditor."

In **Addison on Contracts, Bk. 2, Ch. 8. p. 504,** it is said:

"The action for money paid is founded on the notion that the money was paid by the plaintiff for the defendant at his request, and that the defendant in consideration thereof promised the plaintiff to pay him the amount so expended; for the law raises no implied promise in respect of a voluntary, unauthorized payment which the party was not called upon, or required, to make on behalf of another."

The United States voluntarily confirmed the land titles, and provided that the patents should not be canceled.

If this was an incidental benefit to the defendant company, it incurred no obligation to pay for it.

In **McGee v. City of San Jose, 68 Cal. 94,** the court said:

"It is well settled principle of law that one person cannot without authority pay the debt of another, and charge the amount so paid against the party for whose benefit the payment was made."

See, also, **Canney v. S. P. R. R. Co., 63 Cal. 501; Doe v. Culverwell, 35 Cal. 291; U. S. v. Driscoll, 96 U. S. 421; Merritt v. Scott, 50 Am. Dec. 368.**

NINTH.

This point is sufficiently answered in subdivision II of our opening brief.

TENTH.

This point is sufficiently answered on the first pages of this brief, in what we there said replying to the chapter of "Brief for United States" written under caption-heading "Mistakes of Counsel for Appellants."

ELEVENTH.

This contention is fully answered in our opening brief.

It is respectfully submitted that the bill should be dismissed.

WM. SINGER, JR.,
Attorney for the Appellants.

WM. F. HERRIN,
Counsel for the Appellants.

No. 1046

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

NICK GURVICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

See page 107

FILMER BROS., PRINTERS, 424 SANSOME ST., S. F.

INDEX.

United States of America,
District of Alaska. } ss.

Pleas and proceedings began and held in a criminal cause, at a regular term of the United States District Court for Alaska, Division No. 1, beginning on the 7th day of December, A. D. 1903, and ending on the 2d day of March, 1904.

Present: The Honorable M. C. BROWN, Judge.
The Honorable J. M. SHOUP, Marshal.
The Honorable W. J. HILLS, Clerk.

On the 12th day of January, 1904, the Grand Jury returned into open court the following indictment, to wit:

In the District Court of the United States of America, District of Alaska.

THE UNITED STATES
vs.
NICK GURVICH. } Section 466, Penal Code.

Indictment.

At the December term of the District Court of the United States of America, within and for the District of Alaska, Division No. 1, thereof, in the year of our Lord one thousand nine hundred and three, begun and held at Juneau, in said District, beginning December 7th, 1903.

The Grand Jurors of the United States of America, selected, impaneled, sworn and charged within and for the District of Alaska, accuse Nick Gurvich by this indictment of the crime of selling liquor to minors committed as follows:

The said Nick Gurvich at or near Douglas within the said District of Alaska, Division No. 1 thereof, and within the jurisdiction of this Court, on the 2d day of January, and at divers other times, in the year of our Lord one thousand nine hundred and four did knowingly, willfully and unlawfully, after having obtained a license to retail intoxicating liquors at Douglas within the District, of Alaska, Division No. 1, and within the jurisdiction of this Court, and then holding barroom license No. 93D issued on the 12th day of August, 1903, for the period of one year, sell, give and dispose of certain intoxicating liquors to certain minors then and there being named as follows: Bernie Noonan, Frank Insley, and other minors to the Grand Jury unknown. And so the Grand Jurors duly selected, impaneled, sworn and charged as aforesaid, upon their oaths do say: That Nick Gurvich did then and there commit the crime of selling liquor to minors in the manner and form aforesaid, contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the United States of America.

JOHN J. BOYCE,
United States District Attorney.

[Endorsed]: "Original. No. 414B. United States of America vs. Nick Gurvich. Indictment for Selling

Liquors to Minors. A True Bill. A. S. Dautrick, Foreman of Grand Jury. Witnesses Examined Before the Grand Jury. John Diggs, Geo. Kennedy, John Penglase, Samuel Keist, Charles Johnson, W. W. Casey, Frank V. Insley, Mervie Huff, Berney Noonan, Joe Coggins. John J. Boyce, U. S. District Attorney. Filed Jan. 12, 1904 W. J. Hills, Clerk. By ————, Deputy."

On the 14th day of January, 1904, the following proceedings were had and entered of record, to wit:

UNITED STATES
vs. } No. 414-B.
NICK GURVICH.

Arraignment.

Now, on this day came the United States Attorney; came also the defendant in person, and being represented by his attorneys, Malony & Cobb, and after the reading of the indictment herein, a copy being served upon defendant, defendant was asked by the Court if he is indicted by his true name and replies that he is, and upon application of counsel for defendant, defendant is granted time in which to plead.

On the 16th day of January, 1904, the following proceedings were had and entered of record, to wit:

UNITED STATES
vs. } No. 414-B.
NICK GURVICH.

Plea.

Now, on this day came the United States Attorney; came also, the defendant and his attorneys, Malony & Cobb. And having been arraigned on a prior day of this term, defendant is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, namely, that of selling liquor to minors, to which the defendant says he is not guilty and therefore puts himself upon the country, and the United States Attorney for and on behalf of the Government doth the same, and this cause is set down for trial, on January 25th, 1904, to follow the trial of cause No. 413-B.

On January 28th, 1904, the following proceedings were had and entered of record, to wit:

UNITED STATES
vs. } No. 414-B.
NICK GURVICH.

Trial.

Now, on this day came the United States Attorney; came also the defendant in person, and being represented by his attorneys, Malony & Cobb, and announcing ready for trial. Thereupon the following men were

selected as jurors to try the issue in this cause: N. Carperson, C. J. Scuse, L. Van Len, John Miller, and E. Korman.

After which the jury having been duly sworn, the following witnesses were called upon to testify in behalf of the prosecution; W. J. Hills, J. M. McDonald, John Penglase, F. Insley, M. Huff, George Kennedy, B. Noonan, C. Johnson, M. Kelly, Sam Keist, W. Casey and Joe Coggins.

Whereupon plaintiff rests its cause, and counsel for defendant present their motion for the court to direct the jury to return a verdict of not guilty, and after argument had and the Court being fully advised in the premises, denies said motion, to which order and ruling of the Court counsel for defendant excepts.

On January 29th, 1904, the following further proceedings were had and entered of record, to wit:

UNITED STATES
vs. } No. 414-B.
NICK GURVICH.

Trial (Continued).

Now, on this day come the United States Attorney; came also the defendant and his counsel and likewise the jury heretofore impaneled and sworn, and each answering to his name, the trial of the cause proceeded with:

Whereupon, the defendant and M. J. O'Conner are sworn and testified in behalf of the defendant, whereupon defendant rests his cause; and after argument had and the jury being instructed as to the law in the premises by the Court, retire in charge of their sworn bailiff for deliberation and thereafter return into Court with their verdict, which is in words and figures as follows:

The United States of America,
District of Alaska.

In the District Court of the United States for the District of Alaska.

THE UNITED STATES OF AMERICA,
vs.
NICK GURVICH.

December Term, 1903.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment.

N. CARPERSON,
Foreman.

Dated Juneau, Jany. 29, 1904.

Which verdict was ordered entered and filed; whereupon the jury was discharged from further consideration of this cause.

On February 23d, 1904, the following further proceedings were had and entered of record, to wit:

UNITED STATES
vs.
NICK GURVICH. } No. 414-B.

Order Denying Motion for New Trial, etc.

Now, on this day this cause came on to be heard upon the motion of defendant for a new trial, and motion for arrest of judgment, and after argument had, the Court being fully advised in the premises, denies both said motions; to which order and ruling of the Court defendant by counsel excepts.

On February 24th, 1904, the following further proceedings were had and entered of record, to wit:

UNITED STATES
vs.
NICK GURVICH. } No. 414-B.

Judgment.

And now on this day came the United States Attorney; came also the defendant in person, and being represented by his attorneys, Malony & Cobb, and defendant having on a former day of this term been by a jury convicted of the crime of selling liquor to minors, and having been given notice of time of sentence, and being now asked by the Court if he has anything to say why the judgment of the Court should not be pronounced against him, and giving no valid and sufficient excuse

therefor; it is therefore the judgment and sentence of the Court that barroom license No. 93-D issued on August 12th, 1903, to conduct a barroom at Douglas, Alaska, for one year from July 1st, 1903, by said Gurvich, be and the same is hereby declared null and void, and that the license fee for the unexpired term of said license be forfeited, and that you, Nick Gurvich, pay all costs incurred in the prosecution of this cause, to which order and judgment of the Court defendant by counsel excepts, and upon application of counsel for defendant, defendant is given thirty days in which to prepare and file his bill of exceptions herein.

On the 1st day of March, 1904, the defendant filed his petition for a writ of error, which is as follows, to wit:

THE UNITED STATES,
vs.
NICK GURVICH, Defendant. } No. 414-B.

Petition for Writ of Error.

Nick Gurvich, defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury, and the judgment entered on the 24th day of February, 1904, comes now by Malony & Cobb, his attorneys, and presents herewith his assignments of error and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit,

under and according to the laws of the United States, in that behalf made and provided, and also that order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court, be stayed and suspended until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

MALONY & COBB,
Attorneys for Defendant.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1 at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Petition for Writ of Error. Filed March 1, 1904. W. J. Hills, Clerk. By ———, Deputy. Malony & Cobb, Attorneys for Deft.

At the same time, defendant filed his assignment of errors which is as follows, to wit:

THE UNITED STATES,
vs.
NICK GURVICH,
Defendant. } No. 414-B.

Assignment of Errors.

Now comes the defendant and assigns the following errors committed by the Court upon the trial of the

above-entitled cause, and upon which he will rely upon the hearing of the case in the Appellate Court.

First.—The Court erred in compelling the defendant to go to trial, over his objections before a jury composed of only six jurors instead of twelve.

Second.—The Court erred in overruling the defendant's motion in arrest of judgment.

Third.—The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed, or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty."

Fourth.—The Court erred in instructing the jury as follows:

"This being accepted as the burden placed upon the prosecution, it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell, to the person described. Permit, is defined by Webster in the follow-

ing language: "to let through; to allow or suffer to be done; to tolerate or put up with." One may permit by giving express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated and may knowingly do so when under obligation of law to prevent the act and takes no adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man, when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act, which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

Fifth.—The Court erred in instructing the jury as follows:

"It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant. The Court charges you that when the bar-keepers of the defendant were selling liquor to minors and others they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian Saloon after the license was granted were sales either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the bar-keeper, the

agent, was the act of the principal and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal."

And for the said errors, defendant prays that said cause be reversed and a new trial granted.

MALONY & COBB,
Attorneys for Defendant.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1 at Juneau. The United States, plaintiff, vs. Nick Gurvich, Defendant. Assignment of Errors. Filed March 1st, 1904. W. J. Hills, Clerk. By ————, Deputy. Malony & Cobb, Attorneys for Deft.

Service of the above and foregoing assignment of errors is admitted to have been duly made this 26th day of February, 1904.

————————,
U. S. District Attorney for the Dist. of Alaska, Division No. 1.

———

On the 1st day of March, 1904, the Court made the following order, which was entered of record, to wit:

At a Stated Term, to wit, the December Term, 1903, of the United States District Court for the District of Alaska, Division No. 1, Held at the Courtroom in the City of Juneau, Alaska, on the 1st Day of March, 1904. Present, the Honorable M. C. BROWN, District Judge.

THE UNITED STATES,
vs.
NICK GURVICH,

Order Allowing Writ of Error.

Upon motion of Malony & Cobb, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered herein; but the Court declines to fix the amount of bond on such writ or to approve any bond to operate as a supersedeas to the judgment herein. And the defendant is allowed twenty days to present his application for supersedeas to the Honorable the Circuit Court of Appeals, and shall serve notice of such application on the United States District Attorney.

M. C. BROWN,
Judge.

On the 1st day of March, 1904, a writ of error was sued out, and served, which, with the proof of service thereon is as follows:

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Writ of Error (Copy).

The President of the United States to the Honorable, the Judge of the District Court of the United States for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said District Court before you, or some of you, between Nick Gurvich, plaintiff in error, and the United States, defendant in error, a manifest error hath happened, to the great damage of the said Nick Gurvich, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 31st day of March, next, in the said Circuit 31st day of aMrch, next, in the said Circuit Court of Ap- Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said

Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 1st day of March in the year of our Lord one thousand nine hundred and four.

[Seal] W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1.

By J. J. Clarke,
Deputy.

Allowed by:

M. C. BROWN,
District Judge.

Service of the above and foregoing writ of error and receipt of a copy thereof is hereby admitted this 1st day of March, 1904.

JOHN J. BOYCE,
United States District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Writ of Error. Filed March 1, 1904. W. J. Hills, Clerk. By ———, Deputy. Malony & Cobb, Attorneys for Deft.

On the same day, a citation was issued, returned and filed, which, with acceptance of service thereon, is as follows, to wit:

THE UNITED STATES,
vs.
NICK GURVICH,
Defendant.
No. 414-B.

Citation in Error (Copy).

The United States of America—ss.

The President of the United States to the United States, and to the Honorable John J. Boyce, United States District Attorney for Alaska, Division No. 1, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States District Court for Alaska, Division No. 1, wherein Nick Gurvich is plaintiff in error and the United States are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of March, A. D. 1904, and of the Independence of the United States, the one hundred and twenty-eighth.

M. C. BROWN,

Judge of the United States District Court for Alaska, Division No. 1.

[Seal] Attest: W. J. HILLS,
Clerk.
By J. J. Clarke,
Deputy.

Service by copy of the above and foregoing citation in error is admitted to have been made this 1st day of March, 1904.

JOHN J. BOYCE,

U. S. District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Citation in Error. Filed March 1, 1904. W. J. Hills, Clerk. By ———, Deputy. Malony & Cobb, Attorneys for Deft.

On the 2d day of March, 1904, the defendant filed a cost bond, which is in words and figures as follows, to wit:

THE UNITED STATES,
vs.
NICK GURVICH,
Defendant.
No. 414-B.

Bond on Writ of Error.

Know all men by these presents, that we, Nick Gurvich, as principal, and A. Kengyol and George Kyage, as sureties, are held and firmly bound unto the United States of America, plaintiffs above named in the sum of two hundred and fifty dollars, to be paid to the said United States of America, their successors and assigns to which payment well and truly to be made, we hereby bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, and assigns, firmly by these presents.

Sealed with our seals, and dated this 1st day of March, A. D. 1904.

Whereas, the above-named Nick Gurvich has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the United States District Court for the District of Alaska, rendered on the 24th day of February, 1904.

Now, therefore, the condition of the above obligation is such that if the above-named Nick Gurvich shall prosecute said writ of error to effect, and abide the decision of the Appellate Court, and pay all costs that may be adjudged against him, if he shall fail to make good his

plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Nike GURVICH.
A. KENGYOL.
GEORGE KYAGE.

Approved this 2d day of March, 1904, to operate only as a cost bond.

M. C. BROWN,
Judge.

[Endorsed]: Original. No. 414-B. In the United States District Court for the District of Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Bond on Writ of Error. Filed March 2d, 1904. W. J. Hills, Clerk. By ———, Deputy. Malony & Cobb, Attorneys for Deft.

On the 4th day of March, 1904, defendant filed his bill of exceptions, which is as follows, to wit:

THE UNITED STATES, Plaintiff,
vs.
NICK GURVICH, Defendant. } No. 414-B.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause, the following proceedings were had, to wit:

First Exception.—Six jurors having been drawn from the box, examined on their voir dire, found qualified,

and accepted by both parties, the Court ordered said six jurors to be sworn, as the jury to try the case; whereupon the defendant objected to being placed upon trial before a jury composed of only six jurors, on the ground that the same was not a legal jury, and demanded a jury of twelve; and the Court overruled said objections and compelled defendant to go to trial before a jury composed of only six jurors; to which ruling of the Court the defendant then and there excepted.

And thereupon, to maintain the issues on their part, the plaintiffs introduced testimony tending to prove that the defendant, Nick Gurvich, was the holder of barroom license No. 93-D, issued on the 12th day of August, 1903, and running for the period of one year from July 1st, 1903. That under said license, he was the proprietor of a saloon on Douglas Island, Alaska, known as the Slavonian saloon. That the defendant himself never tended bar; he had two bar-keepers employed who attended the bar. Defendant was city marshal of Treadwell City, an adjoining town, and lived there. He visited his saloon daily, counted the cash, ordered goods, and exercised full control and direction over the business, usually spending about an hour daily at the saloon. In the months of July, August, September, October, November and December, 1903, sales of intoxicating liquors were made by the bar-keepers to the minors, Bernie Noonan, Frank Insley, and other minors. This occurred on six or seven different occasions. The bar-keepers knew that the said persons were minors at the time of the sales.

(Testimony of Nick Gurvich.)

And the defendant, to maintain the issues on his part, was sworn as a witness and testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. Nick Gurvich.

Q. Are you the defendant in this case?

A. Yes, I am.

Q. Where do you reside?

A. Treadwell City.

Q. Have you any occupation there, what is your business down at Treadwell?

A. I am marshal there.

Q. City marshal? A. Yes.

Q. Just explain to the jury—you are proprietor of the Slavonian Saloon? A. I am.

Q. Just explain what you do with reference to the saloon, how you run it, do you tend bar there yourself?

A. No, sir; I never do.

Q. What supervision do you keep over it?

A. I just go over there to see that everything runs right.

Q. You instruct your bar-keepers?

(Objected to as leading. Question withdrawn.)

Q. Just explain to the jury, Mr. Gurvich, how you run the saloon, your supervision over it, etc.?

A. Well, I run the saloon like all the rest of the boys and try keep everything all right and tell the bar-keepers to sell things to right people, that is all.

(Testimony of Nick Gurvich.)

Q. State whether or not you knew that any liquors were being sold to minors?

A. I say to bar-keepers not be selling that way at all.

Q. You instructed them not to sell to minors or other forbidden persons? A. Yes.

(Counsel for the United States objects to counsel for defendant explaining what the witness means.)

By the COURT.—The witness does not speak very clearly.

(By Mr. COBB.)

Q. Do you remember the time Mr. McDonald, the marshal of Douglas, came to you and stated that he had been informed by the Commissioner that boys had been getting liquor there? A. I am.

Q. You remember that? A. Yes.

Q. What did you do with reference to stopping it?

A. When he tell me I says, "All right, I stop it," and I go to bar-tender and I tell them, both of them.

Q. Has any further complaint ever been made to you since then?

A. No, before the marshal came over.

Q. None before that either? A. No.

Q. That is the only complaint made?

A. That is all to me.

Q. After that you gave further directions to the bar-tenders to stop it? A. That is what I do.

(Testimony of Nick Gurvich.)

Q. State whether or not you ever did consent to the sale of liquor there by the bar-keepers to minors?

A. No, I never.

Q. How much are you about the saloon, are you there constantly, just tell how much you are around?

A. What you mean?

Q. Explain to the jury how much you are about the saloon; are you there all the time?

A. No, I am about a hour every day.

Q. How long do you stay?

A. An hour and a half, sometimes.

Q. What for?

A. See how the register going and other things.

Q. Then what do you do?

A. Go to Treadwell and work; I stay there and sleep there; my family there.

Cross-examination.

(By Mr. BOYCE.)

Q. You say you live at Treadwell? A. Yes.

Q. How long have you lived there?

A. Pretty near, or a little over, five months.

Q. That is since last August or September?

A. Since last August.

Q. Did you go there when you became marshal?

A. I am, yes.

Q. When was you made marshal there?

A. Since that day.

Q. What day was that?

(Testimony of Nick Gurvich.)

A. I don't know what day, sometime in July, I believe, I ain't sure, I believe the 24th of July.

Q. Where did you live before that?

A. In Douglas.

Q. How long did you live in Douglas?

A. Pretty near two years.

Q. How long have you been in the saloon business?

A. About a year and a half.

Q. About a year and a half?

A. About a year now, day after to-morrow a year.

Q. The first of February last year you began the saloon business? A. I am.

Q. Did you then run the Slavonian saloon?

A. I am.

Q. Did you tend bar there at that time?

A. No, sir.

Q. Did you ever tend bar there? A. No, sir.

Q. You applied for this license, didn't you?

A. Yes.

Q. I show you Plaintiff's Exhibit No. 3—I will show you your application, is that your signature?

A. Yes, that is mine.

Q. You swore to that before Mr. Clarke?

A. Yes.

(Objected to as not proper cross-examination.)

By the COURT.—It goes directly to the explanation made by the witness in his defense as to the measure of responsibility for this matter and his supervision

(Testimony of Nick Gurvich.)

there. He just stated the amount of supervision he has given it; whether that is such supervision as the law requires the law will settle.

(After argument.)

(By Br. BOYCE.)

Q. Well, I will withdraw that question and proceed with other questions directly connected with the cross-examination.

By the COURT.—I am not sure but what you are entitled to that question as growing out of his declaration as to proprietorship.

(By Mr. BOYCE.)

Q. I will ask you, Mr. Gurvich—you stated that you was the proprietor of the Slavonian Saloon?

A. Yes.

Q. What do you mean by that?

A. What I mean by that? Well, I got everything belongs to me there except the house.

Q. What? A. The building.

Q. All the fixtures in the saloon belong to you?

A. Yes.

Q. Are you the licensee, did you get the license from the Government? A. I did, sir.

Q. Did you get it in your own name?

A. Yes, I did, sir.

Q. Is anyone else interested in that license?

(Objected to as not proper cross-examination, irrelevant and immaterial.)

(Testimony of Nick Gurvich.)

By the COURT.—The question of proprietorship raises the question as to whether anyone else is interested. I suppose, in fact, that that is the last thing the government would want to show.

By Mr. BOYCE.—The defendant has stated that he was the proprietor and made some declaration as to being down there to look after the register and my purpose is to show the attitude he bore toward this saloon and his knowledge of the men he engaged there and the manner in which they were engaged there, etc.

By the COURT.—Everything that he did, growing out of his proprietorship and supervision is competent to inquire into, but asking whether there were other proprietors would be—

By Mr. BOYCE.—He has stated he was the sole proprietor; I asked whether there was anyone else interested in the business.

By the COURT.—You may ask that question.

(By Mr. BOYCE.)

Q. Were there any others interested in that business beside yourself? A. No, sir.

Q. Do you know Pete Gilovich?

A. I do, sir. He is working for me there.

Q. Working for you? A. He is a Slavonian.

Q. He is not an American? A. Yes.

Q. Who is Archie Belich?

A. He is working for me, he is my cousin.

Q. What does he do? A. He tends bar.

(Testimony of Nick Gurvich.)

Q. Do Archie and Pete tend bar all the time, conducting the business? A. Yes.

Q. How long have they been in that business?

A. Who you mean, them two?

Q. Archie and Pete? A. Since I been there.

Q. Then they were there before this license was taken out? A. Before this last license, you mean?

Q. Yes. A. Yes.

Q. The license which was taken out the 1st of July?

A. Yes, he was there before I took this.

Q. How long have you known them?

A. I know Archie since he was born, and I know Pete about ten years ago.

Q. Now, when the city marshal, McDonald, came to you and made complaint about selling liquor to boys, what did you do in the matter?

A. I answered McDonald I go stop that and I go to bar-tenders and tell about it

Q. What bar-tenders did you go to?

A. Both of them.

Q. What did you say to Archie?

A. I say to Archie, you stop that if you done it, you no sell any more.

Q. What did you say to Pete?

A. Same thing.

Q. What time did McDonald tell you this?

A. About six o'clock in the evening.

Q. How long ago? A. Pretty near two months.

(Testimony of Nick Gurvich.)

Q. Before that time had you ever heard anything about boys getting whisky at the Slavonian saloon?

A. No, sir.

Q. Or beer at the Slavonian saloon?

A. Except one.

Q. One? A. Except one.

Q. Who was that one? A. Birnie.

Q. Birnie who? A. Birnie Noonan.

Q. How long ago had you heard about his getting it there?

A. Pretty near since I was there he was getting it for his father all the time; not all the time, every month.

Q. Every pay day?

A. I don't know about pay day, any time he came there we sent to his father when he say so, when the old man say so.

Q. Did the old man speak to you about it?

A. Yes.

Q. How long before that? A. Long time.

Q. When McDonald came to you?

A. He speak to me pretty near a year ago.

Q. Then Birnie had been getting liquor there for about a year?

A. I don't know about a year, eleven months.

Q. Did you speak to your bar-keepers about it?

A. I did, sir.

Q. You knew what provision was in this license, didn't you—you have a license like this, haven't you?

A. Yes, I have.

(Testimony of Nick Gurvich.)

Q. Stating that no liquor should be sold to minors under this license? A. Yes.

Q. You knew that when you got it?

A. Yes.

Q. You knew that when you applied for the license in July, did you call the attention of Archie and Pete to it? A. To what?

Q. Tell them that the license would not permit any selling to minors? A. Yes, I did.

Q. When? A. As soon as we got the license.

Q. You told them that, did you? A. Yes.

Q. Now, what steps did you take after you heard that the boys had been getting liquor there, to stop it?

A. Well, I tell them I never heard before McDonald tell me and after McDonald tell me I speak to them and tell them to stop it; that is all.

Q. Then, before that time, you say your habit of going to the saloon, when did you go there?

A. Any time I feel like it.

Q. So you had no fixed time to go? A. No.

Q. You went some time every day?

A. Well, yes; every day.

Q. In the day time, or night?

A. Sometime daytime and sometime night-time.

Q. You went there for the purpose of examining the cash, didn't you? A.

A. Yes, and look after everything.

Q. To see what stock was out and what stock to order? A. Yes.

(Testimony of Nick Gurvich.)

Q. You ordered the stock? A. Yes.

Q. And paid the bills? A. I do, sir.

Q. You went there simply to find out whether the cash register checked up with the cash on hand and what stock was short and what you had to buy?

A. Yes.

Q. And that is all the supervision you gave it, isn't it? A. Well, that's all; yes.

Q. Now, when Mr. McDonald told you that these boys had been in the habit of buying liquor there, the only thing you did was to speak to the bar-keepers about it? A. That's all.

Q. Did he tell you he had spoken to the bar-keepers himself about it? A. I don't remember.

Q. Did he tell you he had warned Pete and also warned Archie and given them notice?

A. He never said anything to me only says you stop it—a complaint against you.

Q. He stopped it? A. Yes.

Q. And when you went to the bar-keepers and told them to stop it that was the end of your supervision?

A. Yes.

Q. You didn't do anything more than that?

A. No.

Q. You understood that when you got this license, you had to be responsible for all that was done on the premises, didn't you?

(Objected to as not proper cross-examination.)

(Testimony of Nick Gurvich.)

By the COURT.—You say he was responsible for all that was done on the premises; that would refer to parties that had no connection with the premises whatever. That is all the objection I see to it.

(By Mr. BOYCE.)

Q. Did you understand that you was responsible for men that you kept there as bar-keepers in the sale of liquor? A. Yes.

Q. You did understand that? A. Yes.

Q. Then when McDonald spoke to you and said that these men had been selling to boys and minors you recognized that you were interested in the matter?

A. Yes.

Q. And all that you did was to go and tell them that they must not do it? A. That's what I did.

Q. Do you know—you went there at all hours, you say, day or night—at any time during the day or night you dropped in—any time? A. Yes.

Q. The saloon was open all day and all night, wasn't it? A. Yes, except Sunday, sometime.

Q. It was an all-night house? A. Yes.

Q. You didn't close up at night any time?

A. No.

Q. You know some of these boys that have given evidence in this case, don't you? A. I do, yes.

Q. You have seen some of these boys on the premises, have you not? A. On what?

Q. There at the Slavonian saloon?

(Testimony of Nick Gurvich.)

A. No, I didn't.

Q. Never saw one of them there?

A. I saw only one; he bring some grocery for me there; we cook in there, you see.

Q. Who was he, what was his name?

A. I don't know.

Q. You say when he brought groceries—did you ever see him get a drink? A. No.

Q. You never gave him a drink? A. No.

Q. Do you ever serve behind the bar at all?

A. I go behind the bar.

Q. Do you ever serve drinks there at all?

A. No.

Q. Do you serve customers when they come up to the bar?

A. Sometimes when I go in there I have a drink and somebody else have a drink. That happens once or twice; treat.

Q. Does anybody ever call for a beer when you are behind the bar? A. No.

Q. You mean when you say "treat," anybody coming in there you take a drink and treat? A. Yes.

Q. Do you ever treat over the bar?

A. Not much.

Q. You go outside? A. Yes.

Q. The only time you take a drink behind the bar there is when somebody invites you?

A. If I feel like it.

Q. But you don't act as a salesman or a bar-keeper?

(Testimony of Nick Gurvich.)

A. No, sir.

Q. And the entire business of selling the liquor was conducted by Archie and Pete? A. Yes.

Q. All the sales were made by them and not by you?

A. Well, how you mean by me?

Q. The sales, selling to customers in front of the bar retailing liquor, waiting on customers? A. Yes.

Q. You had known them for a long time when you put them in charge?

A. Yes, I know them a long time.

Q. Do you mean to say they are not interested with you there and own no part of the proceeds of that property? A. Who do you mean?

Q. Archie and Pete?

A. No, except I pay them wages.

Q. They have no interest in the business?

A. No.

Q. They are not your partners? A. No.

Q. They are your servants and act for you and you pay them wages, so much a month? A. Yes.

Q. That is all? A. Yes.

Q. Your principal interest in the business was as you testified in your direct examination to see how the register goes—what do you mean by that?

A. I mean how much we cash in.

Q. How much profit was being made in the business? A. Yes.

Q. You carried on the business as an investment?

A. Yes.

(Testimony of Nick Gurvich.)

Q. As city marshal at Treadwell, did you look after minors visiting saloons there?

(Objected to as not cross-examination, immaterial and irrelevant for this reason: It is simply shown on examination in chief of the witness, that the witness was city marshal there for the purpose of showing what position he had. In the question that is directed to him in cross-examination is whether he did or did not look after the visits of minors at Treadwell to the saloons).

By the COURT.—The objection is that it is irrelevant and immaterial?

By Mr. COBB.—And not proper cross-examination.

By the COURT.—It might be cross-examination, but it has no relevancy as to what he did as marshal. I should say it would be a waste of time to inquire into it.

(By Mr. BOYCE.)

Q. As city marshal of Treadwell, you were familiar with the conditions over at Treadwell and also over at Douglas?

A. No, I got nothing at Douglas except the saloon.

Q. Where do you live? A. Treadwell.

Q. You have a saloon in Douglas? A. I have.

Q. You go there every day? A. Yes.

Q. You go to your saloon every day? A. Yes.

Q. Do you go to Douglas and into your saloon and then leave Douglas? A. Yes.

Q. You are never there except for that purpose?

A. Yes, I sometimes need something and buy it.

(Testimony of Nick Gurvich.)

Q. You buy there? A. Yes, what I need.

Q. Are you familiar with the conditions there?

A. Yes.

Q. Did you ever hear of the boys buying liquor or getting drunk at the Slavonian saloon in Douglas?

(Objected to as having been gone into.)

By the COURT.—It has not been gone into. The objection is overruled. Exception.

A. No, sir, I didn't.

Q. Never did? A. Never did.

Q. You have been there all this time carrying on the business there and never heard of it?

A. Never heard of it.

Q. Did you do anything to superintend the management of that business except what you have stated? Do you understand the question?

A. Yes, I told you no. I do everything there, give orders and tell the boys what to do and tell them how to sweep out and everything.

Q. Tell them how to sweep out?

A. Yes, and everything.

Q. You have told everything you did—all the superintendency of the business that you have is that you are there an hour a day?

A. Yes, and sometimes an hour and a half.

Q. Sometimes an hour and a half and sometimes don't stay at all.

Q. Yes. You took what was coming to you—take it home? A. No.

(Testimony of Nick Gurvich.)

Q. It don't make any difference where you take it, but you take it from the building? A. Yes.

Q. And you make the change, etc., put in there what they need? A. Yes.

Q. And that is all you do with reference to superintending the business, isn't it? A. Yes.

Redirect Examination.

(By Mr. COBB.)

Q. With regard to Birnie Noonan, you say he has been the habit of coming there off and on to get liquor for eleven months? A. Pretty near, yes.

Q. He never paid for it? State how you came to let him have it?

A. His father came to me, tell me anything he ask me forto put it in a sack or any other way to carry to his home.

Q. To carry to his father?

A. Yes, his father pay for that all the time.

Recross-examination.

(By Mr. BOYCE.)

Q. You say his father paid for it all the time?

A. Yes.

Q. Do you know that all the liquor that was peddled out to Bernie Noonan from the bar of the Slavonian saloon was paid for by his father?

A. All he gets there.

Q. How do you know that?

A. The boys tell me.

(Testimony of Nick Gurvich.)

Q. You don't know anything about it?

A. I do, I see it on a book and when he pay we scratch it out.

Q. Do you see Birnie Noonan every time he comes into the saloon and gets beer and whisky? A. No.

Q. You don't know of your own knowledge whether he came in and bought beer on his own hook and paid for it, do you? A. No, sir.

Q. The direction you gave to the bar-keepers there was to give him such liquor as his father wanted?

A. Yes.

Q. He paid nothing over the bar? A. No.

Q. That was paid for by his father? A. Yes.

Q. Any other transactions you don't know anything about? A. No.

Q. Did you ever tell the bar-keepers not to deliver liquor for himself to Birnie Noonan until you was notified by the marshal? A. I didn't.

Q. And it was going on for nine months—two months ago the marshal notified you—and eleven months ago Birnie Noonan commenced to get liquor there?

A. Yes.

Q. Who is Mr. Thomas Noonan?

A. He is the foreman of the Treadwell mine.

It is agreed to be admitted by counsel for the Government that Mr. Thomas Noonan would testify that he told the defendant that if Birnie came there to get liquor to let him have it and it was for him and to let him have it.

By Mr. BOYCE.—We will admit that.

By the COURT.—It may be taken as testimony.

Second Exception.—And thereupon the defendant, before the argument began, prayed the Court in writing to instruct the jury as follows:

"Gentlemen of the Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed, or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty."

But the Court refused to so instruct the jury, to which ruling of the Court the defendant then and there excepted.

And thereupon the Court instructed the jury as follows:

INSTRUCTIONS OF THE COURT.

Gentlemen of the Jury, the indictment under which the defendant is now being tried, charges in substance that Nick Gurvich, at or near Douglas, within said District of Alaska, Division No. One, and within the jurisdiction of this Court, on the second day of January, in the year of our Lord, one thousand nine hundred

and four, and on various other days, did knowingly, willfully and unlawfully after having obtained a license to retail liquors at Douglas within the District aforesaid, and while holding bar-room license No. 93-D, issued on the 12th day of August, 1903, for the period of one year, sell, give and dispose of certain intoxicating liquors to certain minors there, being named as follows: Birnie Noonan, Frank Insley, and other minors to the grand jury unknown. In other words, the indictment charges that the defendant did knowingly, willfully and unlawfully sell, give and dispose intoxicating liquors to minors named Birnie Noonan, Frank Insley, and other minors to the grand jury unknown.

The statute, or so much thereof as this indictment seems to have been brought under is part of section 478, of the code, which reads as follows: "And no licensee in any place shall knowingly sell or permit to be sold in his establishment any intoxicating liquor of any kind to any person under the age of 21 years."

The word "knowingly," used in the statute above referred to and in the indictment does not refer to selling liquor, because the licensee having taken out his license is authorized under the law to sell liquor to persons generally, but not to persons under 21 years of age; the word "knowingly," then refers to the persons to whom the liquor was sold; namely, knowing the person to be under 21 years of age.

In order to convict under this indictment it is necessary to show that the liquor or intoxicants was sold or permitted to be sold with knowledge that the person

to whom sold or given or permitted to be sold or given was under 21 years of age.

Third Exception.—And continuing his instructions, the Court further charged the jury:

"This being accepted as the burden placed upon the prosecution it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell, to the person described. Permit, is defined by Webster in the following language; 'to let through; to allow or suffer to be done; to tolerate or put up with.' One may permit by giving express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated and may knowingly do so when under obligation of law to prevent the act and takes no adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

To which said instruction, the defendant then and there excepted, on the grounds—First: Said instruction placed upon the defendant an active duty, to guard against the violation of the law by its employees, which is not required by law. Second: It made the defendant criminally liable unless he absolutely prevented his

employees from selling to minors, which is not the law. Continuing his instructions, the Court further said:

"Ordinarily, in criminal law a man is not responsible criminally for the acts of his employees, unless the act of the employees was done with the knowledge and consent of the employer or by the employer's direction, either expressed or implied. In the case you are now trying, there is no proof that the defendant, himself, in person, sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence, beyond a reasonable doubt that the sales, if any, made by employees were made or permitted to be made by the defendant, either in express terms or implied, or with his knowledge or consent, you will find the defendant not guilty.

"The law under which the licensee carries on the business of a bar-room or retail liquor dealer requires that the licensee superintend in person the management of the business licensed. To superintend in person the business means that he shall give the same his personal attention. No one is licensed under the laws of Alaska to retail liquor except those who comply with the requirements of the statute and the several statutory provisions in making application therefor, and one of the provisions of the statute is the one above quoted, that the licensee will superintend in person the management of the business licensed.

"Persons who have violated the provisions of the statute under certain conditions are excluded from

those who can obtain a license. The personal supervision apparently required by the statute is that the licensee shall give the business his personal management, in such a way that he may know and be advised of the manner in which it is being conducted; that he must see to it by his personal presence and management that the law which permits him to barter and sell is not violated.

"The offense charged is in the nature of a misdemeanor and under our law 'all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid or abet in its commission, they, in person are principals and to be tried and punished as such; in misdemeanors, there are no accessories, all are principals.'

"It is not proved in this case that the defendant in person did the act complained of. He says to you that the father of the boy, Noonan, requested him to let the boy have beer for him, charging it to him (the father), and to put it in a sack or in some other way, and let the boy bring it to him; and he tells you further that he allowed his bar-keepers to deliver the liquor to the boy for the father and that the father paid for it. This, in my opinion was not giving of liquor or selling liquor to the boy; but what does the defendant say in this connection as to selling or permitting to be sold or given or permitting to be given or sold, to the boy, liquor? Did he say in this connection that the sale or giving of liquor to this boy who was known to be a minor, that

the sale thereof was forbidden by him in his directions to his employees?

"I am not attempting to repeat to you the evidence of the defendant, but to call your attention to the matter testified to by him. You are to recall the exact testimony of the witness in this behalf for yourselves and determine for yourselves what was his statement and what the language used by him, and thereby determine under the obligations of the law to give his business personal supervision, whether when the boy Noonan purchased and paid for liquor himself, if you are satisfied beyond a reasonable doubt that he did purchase and pay for liquor for himself and for his own use, whether the defendant knowingly permitted it to be done.

"The jury are instructed that in determining what facts are proved in this case they should carefully consider all of the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be reasonably and rightfully inferred from the evidence given in the case, although there may be no direct testimony as to such fact."

Fourth Exception.—The Court then further instructed the jury as follows:

"It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant.

The Court charges you that when the bar-keepers of the defendant were selling liquor to minors and others they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian saloon after the license was granted were sales either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the bar-keeper, the agent was the act of the principal and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal."

To which said instruction, the defendant then and there excepted on the ground that under the indictment in this case, it is not the law that the knowledge of the agents or bar-keepers is the knowledge of the principal.

The Court then further instructed the jury as follows:

"Did the bar-keepers know these boys were under 21 years of age? They were required at their peril, under the law, to know and were compelled to use their judgment as to the age of individuals when they presented themselves before them for the purpose of purchasing intoxicants. The duty was upon them to determine the fact from the circumstances as they appeared before them and the failure to make inquiry in no sense excuses their action.

All men are presumed to possess elements of common knowledge and common knowledge advises all humanity as to whether boys are under the age of 21 years when such fact comes within their personal observa-

tion. When these boys presented themselves or anyone of them for the purchase of intoxicants, if their appearance was such and the jury so find beyond a reasonable doubt as to indicate to a person of ordinary capacity and knowledge that they were 15 or 16 or 17 years of age or under 21 years, then the law will infer that the person selling had that knowledge which the statute requires.

Before you can return a verdict of guilty in this case you must find that the matters charged in the indictment are proved to your satisfaction, beyond a reasonable doubt. The defendant is entitled to the general presumption of innocence and that goes with him throughout the case until overcome by evidence which satisfies you beyond a reasonable doubt of his guilt.

You will take this case under the construction of the law as the Court has given it, find your verdict under the evidence as testified to by the witnesses on the stand.

In calling attention to any evidence in the case, it is not the intention of the Court to repeat the testimony or to have you accept it from the Court; the only object of the Court in referring to the matter of testimony was to refer to the substance thereof in such a way as to direct your attention to the matter at issue under the law.

You are the exclusive judges of the credibility of witnesses and the weight to be given to their testimony."

And the above and foregoing were all the instructions given to the jury.

The jury having returned a verdict finding the defendant guilty as charged on January 30th, 1904, the defendant filed his motion in arrest of judgment, which was as follows:

UNITED STATES OF AMERICA,
vs.
NICK GURVICH, Defendant. } No. 414-B.

Motion in Arrest of Judgment.

Now comes the defendant and moves the Court to arrest judgment herein upon the verdict of the jury.—1st: Because said verdict is void, because rendered by an illegal jury, said jury being illegal, in that it was composed of only six persons and not twelve as required by law.

2d. Because no penalty is provided by section 478 of the Criminal Code under which this prosecution is brought, except one of forfeiture, and such penalty is illegal and forbidden by law.

MALONY & COBB,
Attorneys for Defendant.

And on the same day, the defendant filed his motion for a new trial which was as follows:

UNITED STATES OF AMERICA
vs.
NICK GURVICH, Defendant. } No. 414-B.

Motion for New Trial.

Now comes the defendant, by his attorneys, and moves the Court to set aside the verdict of the jury herein, and grant him a new trial hereof for the following reasons, to wit:

I.

Because the Court erred in overruling defendant challenge to jurors who were shown on their voir dire to have served on a regular panel of the jury within the past year, as is more fully shown in the bill of exception.

II.

The Court erred in refusing the instruction to the jury as prayed for by defendant.

III.

The Court erred in charging the jury as shown in the last exception of defendant to said charge.

IV.

The Court erred in instructing the jury in effect that is was the duty of the defendant to adopt adequate means to prevent his employees from selling liquor to minors, as pointed out in the second exception to said charge.

V.

The Court erred, in submitting to the jury the question as to whether defendant knowingly permitted the sale of liquors to minors as pointed out in the exceptions to the charge.

VI.

The Court erred in instructing the jury that knowledge of the agents of defendant was knowledge of the defendant, as is pointed out in the third exception to the charge.

VII.

The verdict of the jury is not supported by the evidence in this; that the defendant was charged in the indictment with knowingly selling, etc., and the evidence conclusively showed that he did not sell and had no knowledge of any sale made to minors by his employees.

MALONY & COBB,
Attorneys for Defendant.

Said motions came on to be heard together, and were argued by counsel, and after due deliberation had were by the Court overruled, to which ruling of the Court the defendant then and there excepted.

Now, on this 29th day of February, 1904, and during the December, 1903, term of court, because the above matters do not appear of record, I, Melville C. Brown. the Judge before whom said trial was held, do hereby approve and allow the above and foregoing bill of ex-

ceptions, and order the same to be filed as, and made a part of the record herein.

M. C. BROWN,
Judge.

O. K.—JOHN J. BOYCE,
U. S. Attorney.

Service of the above and foregoing bill of exceptions is admitted to have been duly made, this 26th day of February, 1904.

JOHN J. BOYCE,
U. S. District Attorney, for the District of Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Bill of Exceptions. Filed Mar. 4, 1904. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Deft.

Clerk's Certificate to Transcript.

United States of America,
District of Alaska, } ss.
Division No. 1.

I, W. J. Hills, clerk of the United States District Court, for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing and hereunto annexed 50 pages of typewritten matter, numbered from 1 to 50, both inclusive, constitute a full, true and correct transcript of the record on appeal in the therein

entitled cause of the United States vs. Nick Gurvich, No. 414-B, as the same appears on file and of record in my office; that the same is in command of the writ of error issued herein; that this transcript was prepared by me and the costs of said preparation and this certificate, amounting to $23.00, has been paid to me by attorneys for appellant.

In witness wherof I have hereunto set my hand and affixed the seal of the Court, this 4th day of March, 1904.

[Seal] W. J. HILLS,

Clerk U. S. District Court for Division No. 1, Alaska.

By J. J. Clarke,

Deputy.

In the United States District Court for Alaska, Division No. 1, at Juneau.

THE UNITED STATES,

vs.

NICK GURVICH,

Defendant.

No. 414-B.

Writ of Error (Original).

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said District Court before you, or some of you, between Nick Gurvich, plaintiff in error, and the United States, defendant in error, a manifest error hath happened, to

the great damage of the said Nick Gurvich, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, to gether with this writ, so that you have the same at the city of San Francisco, State of California, on the 31st day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and record proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 1st day of March, in the year of our Lord one thousand nine hundred and four.

[Seal] W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1.

By J. J. Clarke,
Deputy.

Allowed by:

M. C. BROWN,
District Judge.

Service of the above and foregoing writ of error and receipt of a copy thereof is hereby admitted this 1st day of March, 1904.

JOHN J. BOYCE,
U. S. District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Writ of Error. Filed Mar. 1, 1904. W. J. Hills, Clerk.

In the United States District Court for Alaska, Division No. 1, at Juneau.

THE UNITED STATES,
vs.
NICK GURVICH,
Defendant.
No. 414-B.

Citation in Error (Original).

The United States of America—ss.

The President of the United States to the United States, and to the Honorable JOHN J. BOYCE, United States District Attorney for Alaska, Division No. 1, Greeting:

You hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in

the clerk's office of the United States District Court for Alaska, Division No. 1, wherein Nick Gurvich is plaintiff in error and the United States are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of March, A. D. 1904, and of the Independence of the United States, the one hundred and twenty-eighth.

M. C. BROWN,
Judge of the United States District Court for Alaska, Division No. 1.

[Seal] Attest: W. J. HILLS,
Clerk.
By J. J. Clarke,
Deputy.

Service by copy of the above and foregoing citation in error is admitted to have been made this 1st day of March, 1904.

JOHN J. BOYCE,
United States District Attorney for Alaska, Division No. 1.

[Endorsed]: Original. No. 414-B. In the United States District Court for Alaska, Division No. 1, at Juneau. The United States, Plaintiff, vs. Nick Gurvich, Defendant. Citation in Error. Filed Mar. 1, 1904. W. J. Hills, Clerk.

[Endorsed]: No. 1046. United States Circuit Court of Appeals for the Ninth Circuit. Nick Gurvich, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed March 11, 1904.

F. D. MONCKTON,
Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

NICK GURVICH,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

Petition for the Allowance of a Supersedeas and Order Granting Same.

To the Honorable the Judge of said Court:

The petition of Nick Gurvich, plaintiff in error in the above cause, respectfully shows: That on the 24th day of February, 1904, in the United States District Court for Alaska, in a criminal cause wherein the United States was plaintiff and this petitioner was defendant, your petitioner was adjudged guilty and sentenced. That afterwards on March 1st, 1904, this defendant filed and presented to the judge of said District Court, his petition for a writ of error and the allowance of a su-

persedeas, a true copy of which is hereto attached and made a part hereof. That said petition was heard on said day, and the said Court allowed said writ of error, but expressly refused to fix the amount of security for a supersedeas or to allow any supersedeas to the judgment and sentence aforesaid, or in any manner to suspend the execution of such sentence and judgment pending the decision of said writ of error by this Honorable Court. That a true copy of said order is hereto attached and made a part hereof.

Your petitioner further shows that a complete transcript of the record from the said District Court, is on file in this Honorable Court, showing service of the citation, and all proper steps for the removal of said cause into this Honorable Court, and reference is here made to said transcript for all the particulars therein contained.

Your petitioner tenders herewith a bond in the sum of $1,500, conditioned as required by law and the practice of this Court, which sum is amply sufficient to secure the defendant in error, in the event of the affirmance of said judgment by this Court.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant him a writ of supersedeas or order, suspending and staying said judgment pending the hearing of the writ of error hearing; and your petitioner will ever pray.

LORENZO S. B. SAWYER and
MALONY & COBB,
Attorneys for Plaintiff in Error.

On filing the foregoing petition and the bond therein mentioned it is ordered that said petition be and the same hereby is granted, and all proceedings upon the judgment of the lower court stayed pending the writ of error in the United States Circuit Court of Appeals.

WM. B. GILBERT,
WM. W. MORROW,
Circuit Judges.

THE UNITED STATES,
vs.
NICK GURVICH,
Defendant.
No. 414-B.

Petition for Writ of Error.

Nick Gurvich, defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury, and the judgment entered on the 24th day of February, 1904, comes now by Malony & Cobb, his attorneys, and presents herewith his assignments of error and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court, be stayed and suspended un-

til the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

MALONY & COBB,
Attorneys for Defendant.

At a stated term, to wit, the December term, 1903, of the United States District Court for the District of Alaska, Division No. 1, held at the courtroom in the City of Juneau, Alaska, on the 1st day of March, 1904. Present, the Honorable M. C. BROWN, District Judge.

THE UNITED STATES,
vs.
NICK GURVICH.

Order Allowing Writ of Error.

Upon motion of Malony & Cobb, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore rendered herein; but the Court declines to fix the amount of bond on such writ, or to approve any bond to operate as a supersedeas to the judgment herein. And the defendant is allowed twenty days to present his application for supersedeas to the Honorable the Circuit Court of Appeals for the Ninth Circuit, and shall serve notice of such ap-

plication on the United States District Attorney for Alaska.

M. C. BROWN,
Judge.

Service of a copy of the within application is admitted this 4th day of March, 1904.

JOHN J. BOYCE,
U. S. District Attorney for Alaska, Division No. 1.

[Endorsed]: No. 1046. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Nick Gurvich, Plaintiff in Error, vs. The United States, Defendant in Error. Petition for the Allowance of a Supersedeas. Filed Mar. 17, 1904. F. D. Monckton, Clerk.

In the United States District Court for Alaska, Division No. 1, at Juneau.

THE UNITED STATES,
vs.
NICK GURVICH,
Defendant.
} No. 414-B.

Supersedeas Bond.

Know all men by these presents, that we, Nick Gurvich, as principal and George Keyruge and G. M. Janglar, as sureties, are held and firmly bound unto the United States of America, in the full sum of fifteen hundred Dollars, to be paid to the said United States of America, to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 2d day of March, A. D. 1904.

Whereas, lately at the December, 1903, term of the District Court of the United States for the District of Alaska, Division No. 1, in suit depending in said Court between the United States of America, plaintiff, and Nick Gurvich, defendant, a judgment and sentence was rendered against the said Nick Gurvich, and the said Nick Gurvich has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the suit aforesaid, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of California, on the 31st day of March, 1904, which citation has been duly served.

Now, the condition of the above obligation is such that if the said Nick Gurvich shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the said 31st day of March, 1904, to be held at the city of San Francisco, State of California, and from day to day and term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court

may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, shall be affirmed, then the above obligation shall be null and void, else to remain in full force, virtue and effect.

NICK GURVICH.
GEORGE KEYRUGE.
G. M. JANGLAR.

United States of America,
District of Alaska. } ss.

George Keyruge and G. M. Janglar, sureties who have subscribed the above and foregoing bond, being first duly sworn, each for himself, and not one for the other, depose and says: I am a resident and householder of the District of Alaska, and am not an attorney or counsellor at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and am worth the sum of fifteen hundred dollars, over and above all my debts and liabilities and exclusive of property exempt from execution.

G. M. JANGLAR.
GEORGE KEYRUGE.

Subscribed and sworn to before me this 2d day of March, A. D. 1904.

[Notarial Seal] J. H. COBB,
Notary Public in and for Alaska.

[Endorsed]: Supersedeas Bond. Filed Mar. 17, 1904. F. D. Monckton, Clerk.

In the United States District Court for the District of Alaska, Division No. One.

UNITED STATES
vs.
NICK GURVICH,

Opinion on Application of Defendant for Writ of Error and Supersedeas Bond.

This prosecution was brought under section 478 of Carter's Code, which provides that no licensee in any place shall knowingly sell or permit to be sold in his establishment any intoxicating liquor of any kind to any person under the age of 21 years, under the penalty upon due conviction thereof of forfeiting such license, and no person so forfeiting his license shall again be granted a license for the term of two years.

It will be observed that the only penalty attached to the offense here charged; namely, selling liquor to persons under 21 years of age, is the forfeiture of the license theretofore granted. Suppose the Court has not erred in the trial of this case and the defendant is permitted to give a supersedeas bond and the proceedings of this court on review by the court of errors should be affirmed; still the licensee would continue the business he is now engaged in and the term over which the license runs would expire before this case can be presented to the Appellate Court and the question of error

determined by that court. Thus the section of the statute under such conditions would become nugatory and the defendant escape the penalty attached to his act simply by giving this bond and by taking his case to the Court of Appeals. Is it possible that the Congress of the United States intended that their act punishing this offense, if it can be called a punishment, should be made nugatory and avoided by the act of the person who shall violate the terms of his license? I cannot so construe the statute.

Under the law providing for licenses, section 465 provides that the party desiring a license shall file a petition and shall set forth the various matters stated in the first, second, third, fourth, fifth and sixth subdivisions of said section. Section 466 provides that under a license issued in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor or intoxicated person or to an habitual drunkard. The duty of issuing licenses devolves upon the court or Judge. (See Sections 464-5-7.)

Under our statute the Judge of this court deemed it necessary to print across the face of the licenses the conditions under which they were issued and the prohibitions of the statute were endorsed or printed across the face of the license in red ink so that everyone obtaining the same might see and understand; and among the conditions it was stated that no intoxicating liquors should be sold or given or in anywise disposed of to any minor, Indian or intoxicated person or to an habitual drunkard, and that no female or minor or person

convicted of crime should furnish or distribute any intoxicating liquors to any person or persons.

Section 473 provides that any person having obtained a license under this act who shall violate any of its provisions shall upon conviction of any violation, be fined," etc., etc.

It will be observed that subdivision 5 of section 465 provides that the party applying for a license shall state that he intends to carry on such business for himself and not as an agent of any other person, and if so licensed he will carry on such business for himself and not as agent for any other person.

The issuing of licenses or persons to whom issued and the conditions under which issued are matters to be determined by the Judge or the court, as well as depriving a party to whom a license has been issued of the same for the violation of its terms. Under the peculiar law we are required to enforce, I am of the opinion that the procedure under section 478 and the trial thereby provided for, is a proceeding to inform the court or Judge as to whether the person who has received a license is violating the terms or permitting to be violated the terms thereof so that he may set aside and have forfeited the license before issued; that it from such procedure the Court is of the opinion that the person to whom license has been issued is an improper one to conduct the liquor business that it is a matter wholly for the Court to set his license aside and that no appeal or error lies from the Court's decision, but I will allow the writ of error in this case in order

that the higher court may pass upon the matter, but I decline to accept the supersedeas bond.

Dated, Juneau, March 1st, 1904.

M. C. BROWN,
Judge.

[Endorsed]: No. 414-B. United States vs. Nick Gurvich. Opinion on Application of Defendant for Writ of Error and Supersedeas bond. Filed Mar. 14, 1904, as of March 1, 1904. W. J. Hills, Clerk.

United States of America,
First Division,
District of Alaska.

The above is a true copy of opinion on application of defendant for writ of error and supersedeas bond made by the above court on the 1st day of March, 1904.

Witness my hand and the seal of said Court this 14th day of March, 1904.

[Seal]

W. J. HILLS,
Clerk.
By J. J. Clarke,
Deputy.

[Endorsed]: No. 1046. United States Circuit Court of Appeals for the Ninth Circuit. Nick Gurvich vs. The United States of America. Opinion on Application of Defendant for Writ of Error and Supersedeas Bond. Filed March 21, 1904. F. D. Monckton, Clerk.

This record continued at page 107

NO. 1045

IN THE

United States
Circuit Court of Appeals

Ninth Circuit.

APPEAL FROM UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF CALIFORNIA,

SOUTHERN DIVISION.

Southern Pacific Railroad Company, *et al.*,

Appellants and Defendants.

vs.

The United States.

Reply Brief for United States.

JOSEPH H. CALL,

Special United States Attorney.

SPENCER & PARKER, Law Printers, 238 New High St., Los Angeles, Cal.

See page 1

NO. 1045

IN THE

United States
Circuit Court of Appeals

Ninth Circuit.

APPEAL FROM UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

Southern Pacific Railroad Company, *et al.*,
Appellants and Defendants.

vs.

The United States.

Reply Brief for United States.

I.

It is not intended in this reply brief to re-argue the questions or re-state the matter contained in the "Brief for United States" in this case.

We desire to correct some misapprehensions on the part of counsel for appellants, and to aid the court in determining the controversies between the parties.

The opinion of the court below, is at Record 123. The

decree of that court is at Record 114. The opinion of the Circuit Court referred to in the opinon in the present case in the Brown and Bray cases, is reported in 68, Federal, 333, and the opinion of the court below referred to in the opinion in the present case, is at 117 Federal, 544.

The opinion of this court in the Brown and Bray cases, is reported at 75 Federal, 85.

II.

The bill of complaint in the present case [Record 13] prays (1) for a cancellation of the patents to the lands described in the bill, (2) that the title of the United States to said lands be quieted, (3) that in case it shall appear that said lands or any of them have been sold by said company to *bona fide* purchasers, that a recovery may be had for the government value of such lands, and (4) for general equitable relief.

No objection was made in the court below by answer, plea or demurrer, to the court entertaining jurisdiction in equity, and it was for that reason that the court adopting its decision and opinion in 117 Federal, 544, held that the defendants (appellants here) had waived any right to object to the court entertaining jurisdiction in equity.

It was not until answer to the merits, replication and final completion of testimony and final argument upon the merits, that the defendant suggested that the court had no jurisdiction in equity.

III.

The suggestion in "Appellants' Reply Brief" [p. 4] that the grant to the Southern Pacific is a grant "to the amount" of ten odd sections per mile, might be misunderstood and lead to the thought that counsel was claiming that the grant to the Southern Pacific was a grant of *quantity* and not a grant of *specific lands* within certain place limits, with a right under certain conditions, to select indemnity for losses.

It has often been decided that the grant to the Southern Pacific as well as that to the Northern Pacific, which is in similar terms, is a grant of *specific lands* and also a grant *in præsenti*. The only lands so conveyed by the present grant and within the limits designated, were the public lands not reserved, sold or otherwise disposed, and free from pre-emption, or other claims or rights at the time of definite location.

United States v. Southern Pacific Railroad, 146 U. S. 570.

IV.

We respectfully submit to the court that the stipulations at pages 132, 133 and 488 of the record, to the effect that there still remains a vast quantity of lands within the Southern Pacific indemnity limits, which it has never selected and which are still open to such selection, cannot be contorted into a stipulation that there is any deficiency in the Southern Pacific grant.

As counsel for appellants admits, the Southern Pacific grant has not been finally adjusted and it cannot be as-

certained until such final adjustment, whether there will be any deficiency.

Oregon Railroad v. United States, 189 U. S. 103, 115.

If the Southern Pacific Railroad gets patents to all the lands it is entitled to, and described in the grant, there can be no deficiency, whatever the quantity may be.

All calculations made in the Interior Department of what the Southern Pacific might get, under its grants, was a calculation in gross, and embraced a theoretical quantity, not taking into calculation grants to other railroads within the Southern Pacific limits for which the Southern Pacific was not entitled to make indemnity selections.

It has been decided by this court by the Supreme Court of the United States and by the Circuit Court below, that one railroad company cannot select as indemnity nor make indemnity selections as for lands lost to it, which were granted to another railroad company, for another and distinct object of internal improvement, and that the forfeiture of the grant to such other railroad, could not inure to the benefit of the junior grantee.

Southern Pacific v. United States, 168 U. S. 1, 47;
Clark v. Herrington, 186 U. S. 206, 208;
Southern Pacific v. United States, 189 U. S. 147, 452;
Chicago Railroad v. United States, 159 U. S. 372, at page 375;
Sioux City Railroad v. United States, 159 U. S. 349, 366;
United States v. Southern Pacific Railroad, 117, F. 544.

This court said in United States v. Southern Pacific, 98 Federal 27, at page 40:

> "The law does not contemplate an indemnity for a loss which has never been sustained, and we think the Supreme Court has so determined, and the controversy has been closed." (Citing authorities.)

Within the limits of the Southern Pacific grants are several million acres of lands granted to other railroads, which were excepted from the Southern Pacific grant, restored to the public domain for the sole use and benefit of the United States, and for which the Southern Pacific could not select indemnity, as that right was given to the railroads to whom those grants were made.

V.

As to the other points discussed in appellants' Reply Brief, it is submitted that they are fully met by the "Brief for United States" in this case.

The bill as filed, sought a decree quieting title, cancellation of patents, determination of rights of *bona fide* purchasers, and recovery for value of lands in the hands of *bona fide* purchasers, and the decree granted the relief sought and did quiet the title of the United States and vacated any patents which had been issued as to certain lands, and by reason of the Southern Pacific having placed a portion of the lands beyond the reach of the court, by conveying them to third parties who held them as innocent purchasers, the court below granted a recovery for the government value of such lands.

No adequate reason has been suggested why such a suit may not be maintained in equity, nor why, when the court has taken jurisdiction of the cause upon several distinct and clearly established equitable grounds, that it may not go on and do complete justice between the parties, to avoid a multiplicity of actions, and upon the authorities cited in the opening brief for the government, we submit that the court may and should do so.

Respectfully submitted,

JOSEPH H. CALL,

Special United States Attorney.

No. 1046

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

NICK GURVICH,

Plaintiff in Error,

vs.

UNITED STATES,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

MALONY & COBB,
Attorneys for Plaintiff in Error.

LORENZO S. B. SAWYER,
Of Counsel.

FILMER BROS., PRINTERS, 424 SANSOME ST., S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

NICK GURVICH,
Plaintiff in Error,
vs.
UNITED STATES,
Defendant in Error.
No. 1046.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, defendant in the court below, was indicted and tried for the crime of selling liquor to minors, contrary to the provisions of the statute in such case made and provided. According to the testimony (Record, 21-37), defendant, as we shall hereafter call him, was the holder of barroom license No. 93-D, issued on the 12th day of August, 1903, and running for the period of one year, from July 1, 1903. (Record, 20, 24.) Under said license he was the proprietor of a saloon on Douglas Island, Alaska, known as the Slavonian saloon. Defendant himself never tended bar (Record, 24, 32, 33); he employed two bar-keepers, who tended

the bar. He was city marshal of Treadwell City, an adjoining town, and resided there. He visited his saloon daily, counted the cash, ordered goods and exercised full control and direction over the business, usually spending about an hour daily at the saloon. In the months of July, August, September, October, November and December, 1903, sales of intoxicating liquors were made by the bar-keepers to the minors, Bernie Noonan, Frank Insley, and other minors. This occurred on six or seven different occasions. The bar-keepers knew that said persons were minors at the time of the sales. Plaintiff in error instructed his bar-keepers not to sell liquor to minors. (Record, 22, 27, 29, 31.) He never even heard of boys buying liquor or getting drunk at his saloon (Record, 35), until one Mr. McDonald, the marshal of Douglas, came to him and stated that he had been informed by the commissioner that boys had been getting liquor there. (Record, 22, 28.) And Bernie Noonan got beer "every month" for his father (Record, 28, 37), Mr. Thomas Noonan, the foreman of the Treadwell mine, who paid for it. So it appears that defendant did not himself sell any liquor to the minors; but he was nevertheless convicted and sentenced. (Record, 6, 7, 46.)

The jury that convicted him was composed of six (only five names are mentioned in the minutes of trial) instead of twelve men. (Record, 5.)

These are all the facts which we deem necessary to justify, and even compel, a reversal of the judgment herein.

SPECIFICATION OF ERRORS.

We follow the assignment of errors. (Record, 9.)

1. The Court erred in compelling the defendant to go to trial, over his objections, before a jury composed of only six instead of twelve jurors.

2. The Court erred in overruling the defendant's motion in arrest of judgment.

3. The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty."

4. The Court erred in instructing the jury as follows:

"This being accepted as the burden placed upon the prosecution, it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell to the person described. 'Permit' is defined by Webster in the following language: 'to let through; to allow or suffer to be done; to tolerate or put up with.' One may permit by giving

express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated, and may knowingly do so when under obligation of law to prevent the act and takes no adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man, when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act, which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

5. The Court erred in instructing the jury as follows:

"It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant. The Court charges you that when the bar-keepers of the defendant were selling liquor to minors and others, they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian saloon after the license was granted were sales, either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the bar-keeper, the agent, was the act of the principal, and, in my opinion, under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal."

And for the said errors, defendant prays that said cause be reversed and a new trial granted.

ARGUMENT.

1. The Court erred in compelling the defendant to go to trial, over his objections, before a jury composed of only six instead of twelve jurors. His demand for a constitutional jury of twelve men was denied, to which ruling of the Court defendant then and there excepted. (Record, 20). The Alaska Code, Title II, § 171, among other things, provides as follows: "The jury shall consist of twelve persons unless the parties consent to a less number. Such consent shall be entered in the journal; provided, that hereafter in trials for misdemeanors six persons shall constitute a legal jury." We contend that the quoted portion of the said section is void because it deprives a person of the right of trial by a jury of twelve competent, impartial men as guaranteed to every citizen by the provisions of the constitution. (Con., art. III, § 2, cl. 3; and Amendments, art. 7.) We contend, further, that Congress has no power under the constitution to pass an act authorizing a trial in a criminal case by a jury of less than twelve men. The terms "jury" and "trial by jury" are, and always have been, well known in the language of the law. As used in the constitution they mean twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, etc. (Black's Law Dictionary.) And a "trial by jury" is a trial by such a body so constituted. Of the numerous citations of authorities for our contention, with which we might

weary the Court, we content ourselves with only one, which we think abundant,—Thompson vs. State of Utah, 170 U. S. 343.

Such a provision cannot be sustained on the theory that it is a police regulation; for as such it would be equally obnoxious to law and justice. The only theory upon which such legislation with regard to inferior and limited tribunals has been sustained, is that upon an appeal from such tribunals, the defendant would be entitled to a trial by a constitutional jury. But such reasoning is not applicable to the District Court of Alaska. That the citizens of Alaska, then, are guaranteed the constitutional right of a trial by jury cannot be questioned. The Alaska Code, Title III, § 367, provides that "so much of the common law as is applicable and not inconsistent with the constitution of the United States or with any (lawful) law passed or to be passed by the Congress is adopted and declared to be the law within the district of Alaska." And article 3 of the Treaty of Cession between the United States and Russia provides that "the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

2. The second error assigned is the overruling defendant's motion in arrest of judgment. (Record, 48.) Although we think the Court erred in overruling said motion, it was, perhaps, a matter of discretion, and

considering the Court's views, we cannot claim that its ruling amounted to an abuse of discretion.

3. The third error assigned is the refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty." (Record, 38.) We still maintain that this instruction asked for is good law and that the Court ought to have given it just as it was without garbling it. The Court itself in the instructions which it did give admits the facts which made this requested instruction pertinent and proper. "In the case you are now trying there is no proof that the defendant himself in person sold any liquor to minors, but such sales, if any, were made by the defendant's employees." (Record, 41.) Does not our law abhor and everybody's sense of justice revolt at the bare idea of punishing a man for a crime that he did not commit?

And in regard to the charge of selling liquor to the boy Noonan for his father, who ordered and paid for it, the Court says: "This, in my opinion, was not giving of liquor or selling liquor to the boy. * * * " (Record, 42.)

4. It is not necessary to repeat the instruction given, the giving of which forms the fourth assignment for error. It will be found in our fourth specification of errors—in the assignment of errors (Record, 10), and in the instructions of the Court (Record, 40). The only argument which we think necessary to make upon this head consists of the objections made by our associates when the instruction was given: 1. Said instruction placed upon the defendant an active duty to guard against the violation of the law by his employees which is not required by law. 2. It made the defendant criminally liable unless he absolutely prevented his employees from selling to minors, which is not the law. (Record, 40.)

5. It is not necessary to repeat the instruction given, the giving of which forms the fifth assignment for error. It will be found in our fifth specification of errors, in the assignment of errors (Record, 10), and in the instructions of the Court (Record, 43). We contend that under the indictment in this case, it is not the law that the knowledge of the agents or bar-keepers is the

knowledge of the principal, and we do not think this point needs more than statement.

We respectfully submit that the judgment herein should be reversed and a new trial granted.

MALONY & COBB,

Attorneys for Plaintiff in Error.

LORENZO S. B. SAWYER,

Of Counsel.

NO. 1046

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NICH GURVICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

LORENZO S. B. SAWYER,
MALONY & COBB,
Attorneys for Plaintiff in Error.

In the United States Circuit Court of Appeals,
for the Ninth Curcuit.

NICH GURVICH, Plaintiff in Error
vs.
THE UNITED STATES of AMERICA
Defendant in Error.

Upon writ of error to the United States District Court for Alaska Division No. 1.

BRIEF OF PLAINTIFF IN ERROR

Lorenzo S. B. Sawyer,
Malony & Cobb,
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiff in error was indited at the regular December 1903 term of the District Court for Alaska Division No.1, for "Knowingly, willfully and unlawfully, after having obtained a license to retail liquors at Douglas, within the District aforesaid and while holding bar-room license No. 93, ~~Division No.1~~, sell, give and dispose of certain intoxicating liquors to certain minors" etc. The indictment purported to be drawn under Section 466 of the Alaska Penal Code, (Rec. p. 1), but the lower court held that the offense charged was denounced by Section 478, (Rec. p 39), which provides that "No licensee in any public place shall knowingly sell or permit to be sold in his establishment any intoxicating liquors of any kind to any person under the age of 21 years" under penalty of having his license revoked and the money paid therefor forfeited. (Alaska Code Part 2 Sec. 478.)

The defendant was put on trial before a jury of six men who returned a verdict of guilty as charged. Motions for a new trial and in arrest of judgment were filed and overruled and on February 24th, 1904, judgment and sentence were pronounced. (Rec. p. 7 - 8). A bill of exceptions was ~~se~~ved, a writ of error sued out, ~~orders~~ assigned and the cause is now here for review.

There are five errors assigned, but the questions raised are only two:

First: Can a defendant be convicted of crime under the authority of the United States before a jury composed of only six men?

Second: Can a defendant be legally convicted of "knowingly, willfully and unlawfully" selling liquor to minors, when the facts show that such sales were made by his employees without his knowledge or consent and in violation of his orders?

The first question is raised by the

FIRST AND SECOND ASSIGNMENTS OF ERRORS.

The bill of exceptions shows that when six jurors had been examined, tried and accepted as jurors by both parties the court ordered said six jurors to be sworn as the jury to try the cause. The defendant thereupon objected to being placed upon trial before a jury composed of only six jurors on the ground that same was not a legal jury and demanded a jury of twelve; but the court overruled said objection and compelled the defendant to go to trial before a jury composed of only six jurors, to which ruling the defendant then and there accepted.—Rec. p.19 and20. The motion in arrest of judgment—Rec, p. 46 - -was based upon the ground that the verdict was illegal and void, in that it was rendered by a jury composed of only six jurors.

ARGUMENT.

It is true that the Alaska Code, Part 2, Sec. 171, provides that trials of misdemeanors shall be before a jury composed of six. But we respectfully submit that such statute is unconsti-

tutional and void. The Constitution, Art 3 Sec. 2, provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." The same right to trial by jury is again guaranteed by the sixth amendment. Thence arises two questions: First, is a jury of six a constitutional jury? And second, has the Congress the power to abrogate this constitutional guarantee in Alaska?

It is, we think, too well settled to require extended argument that the "jury" guaranteed in the Constitution means a jury of twelve, neither more nor less, such as was understood at the common law.

Cooley's ~~Common Law~~, 391

1 Bishop's Criminal Proc., Sec. 764, 768, 773, 774, 779 and 781.

Thompson vs. Utah, 170 U. S. 343.

Many other authorities might be cited but we deem it unnecessary.

Can Congress then abrogate this rule in a Territory of the United States? The Supreme Court in the Thompson case has answered this question emphatically in the negative. We quote from the opinion of Mr. Justice Harlan:

"That the provisions of the Constitution of the United States relating to the right of the trial by jury in suits at common law apply to the territories of the United States is no longer an open question. Webster vs. Reid, 11 How. 437. 460; Publishing Co. vs. Fisher, 166 U. S. 464, 458, 17 Sup. Ct. Springville City vs. Thomas, 166 U. S. 707. 17 Supt. Ct. 717. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the territory of Sepremher 9. 1850 (9 Stat. 453 c 51, ¶6), to provide that the unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: "In our opinion the seventh

amendment secured unanimity in finding a verdict as an essential of feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.

'It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.

"The judgment of this Court in the Reynolds vs the U.S. 98 U.S. 145. 154. which was a criminal prosecution in the territory of Utah, assumed that the sixth amendment applied to criminal prosecutions in that territory.

"In Callan vs Wilson, 127 U. S. 540, 548, 551, 8 Sup. Ct. 1301, which was a criminal prosecution by information in the police court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the third article of the constitution as well as by the fifth and sixth amendments. The contention of the government was that the Constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any state 'the trial shall be at such place or places as the Congress may by law have directed', had, probably, reference only to offences committed on the high seas; that in adopting the sixth amendment the people of the states were solicitous about trial by jury in the states, and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be hereinafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dockyards; and, consequently, that that amendment should be deemed to have superceded so much of the third article of the constitution as related to the trial of crimes by jury. That con-

tention was overruled, this Court saying: 'As the guarantee of a trial by jury, in the third article, implied a trial in that mode, and according to the settled rules of the common law, the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well as those permanantly or temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the constitution or of the original amendments to justify the assertion that the people of the District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property, especially of the privilege of trial by jury in criminal cases. We cannot think," the court further said, "that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States.

"In the late Corporation of the Church of Jesus Christ of the Latter Day Saints vs U. S 136, U. S. 1, 44. 10 Sup. Ct. 792, one of the questions considered was the extent of the authority which the United States might exercise over the territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which—National Bank vs. County of Yankton, 101 U. S. 129, 133--it was said that Congress, in virtue of the sovereignity of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial leg-

islatures valid, and a valid act void; that it had full and complete legislature authority over the people of the territories and all the departments of the territorial governments; that it ,'may do for the territories what the people, under the constitution of the United States, may do for the states." Reference was also made to Murphey vs Ramsey, 114 U. S. 15, 44 5 Sup. Ct. 747, to which it was said: "The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The opinion of the Court in late Corporation of the Church of Jesus of Latter Day Saints vs U. S. then proceeded: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial legislature established therein is generally expressly reserved in the organic acts establishing government in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved Sept. 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if dissap

proved shall be null and of no effect.' 9 Stat. 454.

"Assuming, then, that the provisions of the constitution relating to trial for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale P. C. 161, 1 Chit. Cr. law, 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., but by the judgment of his peers or by the law of the land, it referred to a trial of twelve persons. Those who emigrated to this country from England brought with them this great privilege, as their birthright and inheritance, as a part of that admirable common law which has fenced around and interposed barriers on every side against the approaches of arbitrary power' 2 Story, Const. 1779. In Bac. Abr. title "Juries" it is said; "The trial per pais, or by a jury of one's country is justly esteemed one of the principal excellences of our constitution; for what greater security can any person have in his life, liberty or estate than to be sure of not being divested of nor injured in any of these without the sense and verdict of 12 honest and impartial men of his neighborhood? And hence we find the common law confirmed by Magna Charta." So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses vive voce in the presence of the judge and and jury and by the inspection and direction of the judge.' It must consequently be taken that the word" Jury" and the words" Trial by jury" were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the

adoption of that instrument: and that when Thompson committed the offence of grand larceny in the territory of Utah —which was under the complete jurisdiction of the United States for all purposes of government and legislation--the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

The second question is raised by the Third, Fourth and Fifth assignments of error, which are as follows:

Third—The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed, or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty."

Fourth—The Court erred in instructing the jury as follows:

"This being accepted as the burden placed upon the prosecution, it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell, to the person described. Permit, is defined by Webster in the following language: 'To let through; to allow or suffer to be done, to tolerate or put up with.' One may permit by giving express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated and may knowingly do so when under obligation of law to prevent the act and takes no

adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man, when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act, which is forbidden by the law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

Fifth—The court erred in instructing the jury as follows;

"It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant. The court charges you that when the bar-keepers of the defendent were selling liquor to minors and others they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian Saloon after the license was granted were sales either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away of intoxicants was unlawful and the act of the bar-keeper, the agent, was the act of the principal and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal."

The bill of exceptions shows that the prosecution introduced testimony tending to show that the defendant was the proprietor of the saloon run under the license charged in in the indictment; that the sales to the minors charged were made by his bar keepers (Rec. p 20). It was not claimed or attempted to be shown that the defendant himself sold to minors, and the court so told the jury (Rec. p. 41).

The defendant himself testified, and was not contradicted, that he had no knowledge that the sales were made to minors, until after they were made; that when he heard of

No. 1046

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

NICK GURVICH,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR THE UNITED STATES OF AMERICA

JOHN J. BOYCE,
United States Attorney for the District of Alaska, Division No. 1.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

NICK GURVICH,
Appellant and Plaintiff in Error,

vs.

THE UNITED STATES,
Respondent and Defendant in Error.

Brief for the United States.

STATEMENT OF THE FACTS.

The defendant, Nick Gurvich, made formal application to the United States District Judge, M. C. Brown, for license to retail liquor as provided in chapter 4 of the Alaska Code of Criminal Procedure, and a license was granted. Under this license the said Nick Gurvich conducted, as owner, a saloon, known as the Slavonian saloon, retailing intoxicating liquors. He employed two barkeepers to run the saloon bar. Archie Belich and Peter Gilovich are their names. Gurvich himself seldom attended bar at his saloon, and there is no evidence that he personally sold any liquor. At the December term, 1903, of the United States District Court at Juneau, the said Nick Gurvich and his barkeepers, the above-named Archie Belich and Peter Gilovich, were indicted by the Grand Jury for selling liquor to minors, and at jury trials Nick

Gurvich and Archie Belich were found "guilty." The punishment imposed on Gurvich by the Court was a revocation of his license to sell intoxicating liquor. In due time the defendant, Gurvich, by his attorneys, Messrs. Malony and Cobb, made a motion to arrest the judgment, basing the said motion on two grounds, viz.: 1st, that the jury before whom the case was tried, composed of only six men, was an illegal jury, and, 2d, because the penalty of forfeiture of the barroom license provided by section 478 of the Alaska Criminal Code is illegal and forbidden by law. This motion in arrest of judgment the District Court denied, as it did also a motion for a new trial. The defendant thereupon appealed from the judgment of forfeiture of his license, and on this appeal assigns as error:

1st. That it was error for the Court to compel him to go to trial before a jury of six men instead of a jury of twelve men.

2d. That it was error to overrule the defendant's motion in arrest of judgment.

3d. That it was error to refuse defendant's instructions that the unlawful act of the employee was not the unlawful act of the principal, unless the unlawful act of the employee was made by the direction of the defendant, either express or implied, or with his knowledge and consent.

4th. It was error for the Court to instruct the jury that if a man is required by law to refrain from doing a particular act, and furnishes the means to others with which to do that forbidden act, and adopts no adequate means to prevent the forbidden act being done, he may be said to knowingly permit the act.

5th. That the knowledge of the agent was the knowledge of the principal.

The defendant then, in his appeal from the judgment of forfeiture, of his license, raises the following questions:

THE QUESTIONS INVOLVED.

(a) Where a defendant is charged under the Alaska Criminal Code with a crime which is a misdemeanor, can he be lawfully tried by a jury of six men instead of a jury of twelve men?

(b) Is the knowledge of the unlawfulness and the unlawful act of the agent or employee, the knowledge of the unlawfulness and the unlawful act of the principal or employer?

(c) Is the penalty of forfeiture of a barroom license illegal and forbidden by law when a statute, which sets out the manner and conditions upon which a barroom license shall be granted, provides this forfeiture as a punishment for a violation of such license?

ARGUMENT AND AUTHORITIES.

"(a)" This same question is now before the Supreme Court of the United States in a case from this district entitled, United States vs. Fred Rasmussen, No. 314.

Carter's Alaska Code of Criminal Procedure, in section 120, which provides for the formation of trial juries in criminal cases, directs as follows:

"The jury shall consist of twelve persons, *unless in trials for misdemeanors the parties shall consent to a less number.* Such consent shall be entered in the journal."

And again in section 171 of Carter's Alaska Code of Civil Procedure, which provides for the formation of trial juries it is directed as follows:

"Provided, That hereafter, in trials for misdemeanors, six persons shall constitute a legal jury."

The laws of Alaska above cited require, then, that all misdemeanors shall be tried by a jury composed of six men. The defendant at bar, through his counsel, has questioned this kind of a jury, alleging it illegal and contending that the statute is unconstitutional. We respectfully submit that the defendant cannot question the constitutionality of a law enacted by the Congress of the United States in this Court. Neither can he ask the Court to pass upon this question which involves the construction and application of the Constitution of the United States. The act of Congress of March 3d, 1891, provides thus:

"Appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts direct to the Supreme Court in the following cases: . . . . *In any case that involves the construction or application of the Constitution of the United States.* In any case in which the constitutionality of any *law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.*"

26 U. S. Statutes, 827, sec. 5, as amended in 29 U. S. Statutes, 492.

Or if it be contended that the court in which the action at bar was first instituted is not a federal court but a territorial court (a question not necessary here to discuss), we respectfully submit that our contention is still good and that your Honors cannot pass upon this question. It is provided in 23 U. S. Statutes, 355, relating to the jurisdiction of the Supreme Court of the United States, that, "No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or *in the Supreme Court of any of the territories of the United States*, unless the matter in dispute shall exceed the sum of five thousand dollars. *This section shall not apply to any case* wherein is involved the validity of any patent or copyright, *or in which is drawn in question the validity of any* treaty or *statute of*, or an authority exercised under, *the United States; but in all such cases an appeal or writ of error* may be brought without regard to the sum or value in dispute."

It seems hardly necessary to further enlarge the discussion of this question, as these statutes make it clear that the proper court in which to test the constitutionality of a law of Congress, or *seek to construe or apply the Constitution of the United States*, is the Supreme Court of the United States. Passing to the next question in order, or,

"(b)" *Is the knowledge of the unlawfulness and the unlawful act of the agent or employee the knowledge of the unlawfulness and the unlawful act of the principal or employer?*

The unlawful act of the agent or employee was selling liquor to minors. This act is criminal under the statutes of Alaska regulating the sale of intoxicating liquors. And the general rule of law undoubtedly is, that the principal is not ordinarily liable for the criminal act or acts of his agent committed without his knowledge or consent. But like all general rules, this has its limitations and qualifications. The principal is not always exempt from liability for the criminal acts of his agent, for if the protection of the public safety or health or morals requires that a liability be fastened upon him, then the general rule must be qualified. In theory the State is always an ardent protector of the public health and public morals, especially of the youth. For this purpose its strong arm puts forth a controlling hand into every business, every interest, and with almost arbitrary power it makes every affair of the individual give way in so far as it is necessary to protect its charges, the public safety, the public health, and the public morals. Such is the "Police Power." Under this power Congress has legislated for Alaska upon the subject of intoxicating liquors, and the general rule is as much qualified under this legislation as it is under that of any legislation.

In accordance with this view it is stated, "*There are, however, certain exceptions to the general rule, prominent among which are a class of cases arising under revenue laws and police regulations. . . . . Under this exception have been held to come the cases of sales of intoxicating liquors by clerks or agents.*"

1 Ency. of Law, 1161.

Again, in the clear language of an able text-writer the limitations of the general rule, supra, as applied to the subject of intoxicating liquors, is commented on thus:

"There is, however, a class of cases, as has been seen, where by statutory enactment, the doing of a certain act, otherwise perhaps innocent or indifferent, or at the most not criminal, is expressly prohibited under a penalty. Of this class are many of the statutes in the nature of police regulations which impose penalties for their violation, often irrespective of the question of the intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation exceedingly improbable, if not impossible."

Mechem on Agency, sec. 746.

So Judge Cooley of Michigan stated the law, "Many statutes, which are in the nature of police regulations, impose criminal penalties irrespective of any intent to violate them."

People vs. Roby, 52 Mich. 579, 50 Am. Rep. 270.

It is, perhaps, impossible, at the present time to find a jurisdiction of the United States, where there is not some statute enacted with a design of preventing minors from getting and using intoxicating liquors. It is considered that persons of immature age more easily form abnormal appetites than persons of mature years and experience, and so the main object of these statutes is to prevent them from acquiring habits of dissipation that would unfit them for usefulness. As the fond mother watches with

jealous care her child grow and develop, providing in its helpless times for its physical and moral needs, commanding it to do or not to do those things which it should or should not do, that she may one day see the fruit of her efforts a useful creature; so the State, alike jealous of its children, provides for their welfare in a thousand ways; and by just such legislation as we are discussing provides a means, though not always efficient, for crushing the serpent's head and saving to itself useful men and women.

"Some of these statutes merely prohibit the sale of intoxicating liquors to minors; others prohibit either a sale or a gift; while there are others which are even more comprehensive in their scope and prohibit the 'furnishing' of intoxicating liquors to minors."

17 Ency. of Law, 333.

The statutes are thus classified into three distinct classes. The statutes of Alaska are not unlike those of other jurisdictions. After providing the conditions under which a license can be obtained, section 466 of Carter's Alaska Code of Criminal Procedure is as follows:

"That under the license issued in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor, Indian or intoxicated person, or to an habitual drunkard."

And section 473 provides a penalty for violating the license thus:

"That any person, having obtained a license under this act, who shall violate any of its provisions, shall, upon con-

viction of such violation, be fined not less than fifty dollars nor more than two hundred dollars, and upon every subsequent conviction of such violation during the year for which such license is issued shall be fined a like amount, and in addition to such fine shall pay a sum equal to twenty-five per centum of the amount of the fine imposed for the offense immediately preceding, and have his license revoked, and in case of nonpayment of the fines and penalties above named shall be imprisoned for a period of time not exceeding six months, or until the same are paid. That after second conviction no license shall thereafter be granted to said party: Provided, that no minor under sixteen years of age shall be allowed to enter any place where liquors are sold other than retail, without the consent of the parent or guardian of such minor."

And it is provided further in section 478 of the same code:

"That no licensee under a barroom license shall employ, or permit to be employed, or allow any female or minor or person convicted of a crime, to sell, give, furnish, or distribute any intoxicating drinks or any admixture thereof, ale, wine, or beer, to any person or persons. And no licensee in any place shall knowingly sell or permit to be sold in his establishment any intoxicating liquor of any kind to any person under the age of twenty-one years, under the penalty, upon due conviction thereof, of forfeiting such license, and no person so forfeiting his license shall again be granted a license for the term of two years."

Of the three classes this Alaska statute is easily one of the most comprehensive class. Its terms are broad

enough to bring it within that class which "prohibits the 'furnishing' of intoxicating liquors to minors."

But how are statutes of this nature construed? We respectfully submit that the answer to this question must necessarily determine the liability of the defendant at bar.

The cases furnish two constructions each opposed to the other. One line of cases hold that the master is not criminally liable for the acts of his servant or agent done in the course of his business and within the scope of the agent's employment unless authorized either expressly or impliedly. The other line of cases hold that the master is criminally liable for the acts of his servant or agent done in the course of his business and within the scope of the agent's employment whether authorized or not.

17 Ency. of Law, 386-7, and cases cited.

The authorities are about evenly divided. But, considering the care with which legislatures have legislated on this subject and the evils they have tried to prevent, the better rule would seem to be the latter. They expressly prohibit the sale, gift, or the furnishing of intoxicating liquors to minors. So if the prohibited act be done by the agent in the course of his employment the principal must respond.

"*This is particularly true in those cases where the principal confides, in a greater or less degree, the conduct and management of his business to his agents.* He selects his own agents and has the power, as well as the duty, to control them; and if by reason of his lack of oversight or their

own carelessness or unfaithfulness, the prohibited act is done, he should be held accountable."

Mechem on Agency, sec. 746.

Section 465 of the Alaska Code of Criminal Procedure requires an applicant for a license to sell intoxicants to file a petition stating among other things:

"Fifth. *That he intends to carry on such business for himself and not as an agent of any other person, and if so licensed he will carry on such for himself and not as the agent of any other person.*

"Sixth. *That he intends to superintend in person the management of the business licensed, and if so licensed he will superintend in person the management of the business so licensed.*"

We especially call your Honor's attention to this last provision, for the facts of the case at bar, as can be seen from the record, show that this statute has been violated.

It is but necessary in the case at bar to refer to the statement of facts, supra, to see that the barkeeper of the defendant run his saloon for him. This alone—doing what he has expressly said in his petition he would not do —renders him liable to the penalty imposed by the statute.

But the two statutory constructions, supra, simply amount to this: in the first class the cases make "intent" an ingredient of the offense; in the second class "intent" is no ingredient of the offense. Under which construction, then, will we place the Alaska statutes, set out supra? The code sets out in detail just the manner of obtaining

the right or license to sell intoxicants; then in section 466 it goes on: *"That under the license in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor."* Clearly there can be no "intent" necessary in such unequivocal language. The statute says that *no* liquors shall be sold to minors; if they are the crime is fastened upon the man who is responsible for the license. It is his duty to prevent a violation of the license. The learned Judge in the District Court in his instructions to the jury stated: "That when the barkeepers of the defendant were selling liquor to minors and others, they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian saloon after the license was granted were sales either lawful or otherwise, under said license, *and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the barkeeper,* the agent, was the act of the principal, and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agent or barkeepers was the knowledge of the principal."

Section 478 of the Alaska Code states that "no license in any place shall knowingly sell or permit to be sold," etc. This is even stronger language than section 466, for the defendant is not to *permit* liquor to be sold to minors. It is his duty under the section to see to it that liquor is not sold to minors and if it is, whether by him or not, whether under his direction or not, whether with his knowledge or consent or not, he is still responsible for the selling though done by his agent. It is an abso-

lute command to the licensee to prevent liquor being sold to minors. Again referring to the instructions in the court below, in regard to the nature of knowledge required under the statute affecting the sale or permission to sell to minors:

"Permit is defined by Webster in the following language, 'to let through; to allow or suffer to be done; to tolerate or put up with.' One may permit by giving express authority to another to do a particular act, or he may allow or suffer the act to be done or tolerated, *and may knowingly do so when under obligation of law to prevent the act, and takes no adequate action or means to prevent being done that which the law requires him to prevent.* In other words, *if a man when required by law to refrain from doing a particular act, furnishes the means to others, with which to do that act which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act.*"

To both these instructions given by the lower court the defendant excepted and makes them his fourth and fifth errors in his assignment of errors, but we respectfully submit that they state the law and are supported by the authorities.

The defendant asked this instruction:

"Gentlemen of the jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and

consent of the employer, or by the employer's directions, either express or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either express or implied, or with his knowledge and consent, then you will find the defendant not guilty."

At common law the defendant's instructions would perhaps state the law. The rule was: "A master is not responsible criminally for any violation of the liquor laws committed by his clerk, servant or agent, without his knowledge or consent, express or implied, or in his absence and in disregard of his commands or instructions."

Black on Intox. Liq., sec. 368 and cases cited.
Johnson vs. State, 83 Ga. 553, 10 S. E. Rep. 207.

But the statutes of which the Alaska statutes are an example have changed this common-law rule and it is held to be no defense to an indictment against the principal that the unlawful act was done without his knowledge or consent, or without his authority, or in his absence, or even done in contravention of his express and *bona fide* orders.

Black on Intox. Liq., sec. 370 and cases cited.
Carroll vs. State, 63 Md. 551, 3 Atl. 29.

"The object of these statutory provisions, in effect is to require the principal to see to it, at his peril, that no un-

lawful sales are made in his establishment. And if it savors of severity to subject him to punishment for the acts of others which he had expressly forbidden, it must be remembered that he can escape liability by selecting servants and agents who will keep within the law and obey his orders or by abandoning a business which exposes him to such hazard."

Black on Intox. Liq., sec. 370.

Many analogous cases might be cited to show that an intention to violate the law is *not* an ingredient of offenses of this kind which are offenses under the police power, such as sales of liquor on Sundays, sales to habitual drunkards, etc., etc. In Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating.

Commonwealth vs. Boynton, 2 Allen, 160.

And of the offense of selling adulterated milk, though he was ignorant of its being adulterated.

Com. vs. Farren, 9 Allen, 489.

Com. vs. Holbrook, 10 Allen, 200.

Com. vs. Waite, 11 Allen, 264.

If one's business is the sale of liquors, a sale by his agent in violation of law is prima facie by his authority.

Com. vs. Nichols, 10 Met. 259.

Bound at his peril to see that his license was not violated and providing no adequate and effective means to prevent it, the defendant at bar is responsible criminally

for the criminal acts of his agents in selling liquor to minors—for the purposes of the statutes their knowledge was his knowledge, their act was his act—and he must respond to the punishment provided by the law. What is that punishment? This raises the main question or,

"(c)" *Is the penalty of forfeiture of a barroom license illegal and forbidden by law when a statute which sets out the manner and conditions upon which a barroom license shall be granted, provides this forfeiture as a punishment for a violation of such a license?*

"In a general sense, a license is a permission granted by some competent authority to do an act which, without such permission, would be illegal."

State vs. Hipp, 38 Ohio St. 199, 226.

"The popular understanding of the word 'license' is undoubtedly a permission to do something which, without the license, would not be allowable. This is also the legal meaning."

Youngblood vs. Sexton, 32 Mich. 406, 20 Am. Rep. 654.

"A license is a privilege granted by the State, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever. *But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the li-*

cense; that is to say, prohibited in order to compel the taking out of a license."

Cooley on Taxation, 596.

A license involves three leading ideas, according to Mr. Black in section 117 of his work on Intoxicating Liquors:

(a) It confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all.

(b) It legalizes acts, which, if done without its protection, would be offenses.

(c) It is a privilege granted as a part of a system of police regulation.

This last idea distinguishes it from taxation. A tax upon business is primarily for the purpose of raising revenue, although as a secondary object it contemplates the regulation of the business. A license fee is exacted primarily as a means of restricting or regulating a business, although, incidentally, it may produce an addition to the public revenue.

Pleauter vs. State, 11 Neb. 547, 10 N. W. Rep. 481.
State vs. Hipp, 38 Ohio St. 199 (cited supra).

And under a constitutional prohibition against the licensing of the liquor traffic, the legislature still has power to impose taxes upon it.

Black on Intox. Liq., secs. 108 and 179, and cases cited.

A license is not a contract between the licensing authority and the licensee, and any laws enacted by lawful authority, modifying its terms, imposing additional bur-

dens or restrictions upon the holder, *or even revoking the privilege, are not open to the constitutional objection of impairing the obligation of a contract.*

Beer Co. vs. Mass., 97 U. S. 25.

La Croix vs. Fairfield Co., 49 Conn. 591, 47 Am. Rep. 648.

Metropolitan Board of Excise vs. Barrie, 34 N. Y. 659.

Black on Intox. Liq., sec. 127, and cases cited.

A license does not possess the essential elements of a vested right of property. Hence, it cannot be entitled to the protection of that provision of the Constitution which forbids taking property without due process of law.

La Croix vs. Fairfield Co. Commrs., 50 Conn. 321, 47 A. R. 648.

Martin vs. State, 23 Neb. 371, 36 N. W. Rep. 554.

A statute authorizing the revocation of a license for any violation of the liquor laws does not violate the constitutional right to a jury trial.

17 Ency. of Law, 215, and cases cited.

Voight vs. Excise Commrs., 59 N. J. L. 358.

Neither would such a statute be a violation of the constitutional prohibition against depriving any person of his rights, immunities and privileges.

17 Ency. of Law, 215, and cases cited.

Young vs. Blaisdell, 138 Mass. 344.

A license then is not a tax, it is not a contract, it is not a vested or property right, its revocation would not entitle

a man to a jury trial for a cause of revocation and its revocation would not deprive him unlawfully of any of his rights, immunities or privileges. The constitution does not afford any protection on any one of these grounds. These statutes which provide for a revocation of licenses for violations of the liquor laws are valid and not unconstitutional.

17 Ency. of Law, 215, and cases cited.

Black on Intox. Liq., sec. 51, and cases cited.

Summing up as to just what a license is, it may be answered thus: It is a *mere special privilege or permission* to do that which would, without it, be unlawful.

State vs. Frame, 39 Ohio St. 413.

17 Ency. of Law, p. 230, and cases cited in note.

Being a mere special privilege or permission from a competent authority to a designated person, with what rights is the licensee clothed? All persons cannot be licensees, but only those who show themselves possessed of the requisite qualities which public policy imposes. "It is of the very essence of all license laws (says Mr. Black in section 130) that a principle of selection be applied to the persons who petition for the privilege, and that it be accorded only to those who possess the moral and other qualifications which tend to secure the public against abuses of the right granted." It follows from this that a license is a special privilege to a designated individual. When a person has shown his qualifications and procured a license, *his privilege or permission under it is always impliedly sub-*

ject to such statutes and laws as are lawfully in existence at the time it is granted, without words in the license expressly referring to such laws.

Baldwin vs. Smith, 82 Ill. 162.

Black on Intox. Liq., sec. 148, and cases cited.

17 Ency. of Law, p. 236, and cases cited.

And a license to sell liquor for certain purposes therein specified cannot protect the licensee from a criminal prosecution for violating the laws of the State by selling liquors for other purposes than those named in the license.

State vs. Adams, 20 Ia. 486.

"Since the privilege conferred by a license is not general, but special and limited in its nature, *and does not include the right to violate any provision of the positive law, it follows that the license will not protect its holder in making sales to infants . . . . or any other persons to whom the statute expressly forbids the selling or furnishing of liquor.*"

Com. vs. Tabor, 138 Mass. 496.

Black on Intox. Liq., sec. 151.

"And it is no defense to an indictment for selling liquor to such classes of persons that the law prescribing and punishing the offense was not passed until after the defendant's license was issued; *for he took the license, not only subject to such laws as were then in force, but also to such as might be thereafter enacted, regulating the sale of liquor.*"

Com. vs. Seilers, 130 Pa. St. 32, 18 Atl. Rep. 541.
Black on Intox. Liq., sec. 151, cited supra.
State vs. Fairfield, 37 Me. 517.

It would not be seriously contended that a man could be licensed to do that which was unlawful. All persons must obey the laws and no license will give them any exemption from such obedience. A licensee is clothed with just such rights as the law allows him under the license. But when a person is given a permission or license to do an act, which would otherwise be unlawful, and violates any provision of the laws, he, at once, renders himself amenable to punishment. In this respect, he stands in no better position than any other subject. There are various kinds of punishments and the liquor laws specifically set out what the punishments for their violations shall be. It is usually a revocation of the license, sometimes a fine, and sometimes both, and as all of the liquor laws are statutory, the punishment for any one jurisdiction must be sought in its statutes. In Alaska, where the defendant at bar chose to sell liquors, the statute reads thus:

"That no licensee under a barroom license shall employ or permit to be employed, or allow any female or minor or person convicted of crime, to sell, give, furnish, or distribute any intoxicating drinks or any admixture thereof, ale, wine or beer to any person or persons. And no licensee in any place shall knowingly sell or permit to be sold in this establishment any intoxicating liquor of any kind to any person under the age of twenty-one years,

under *the penalty, upon due conviction thereof, of forfeiting such license,* and no person so forfeiting his license shall again be granted a license for the term of two years."

Carter's Code of Crim. Proc. for Alaska, sec. 478.

This law was in existence before he applied for or obtained his license. A license was granted to him subject to this law. In the few years past and especially within the last year or two, there has been a vigorous prosecution in this district against violators of the liquor laws, and the worthy Federal Judge here has often severely censured in his charges to juries these culprits, so that this law as well as others in regard to liquor selling must have been forcibly brought home to the defendant at bar, thus rendering his guilt in this case all the more inexcusable. This statute of Alaska is not unlike that of other jurisdictions. It provides the penalty of a forfeiture of the license for selling liquor to minors. Such statutes have been held constitutional by a multitude of authorities, the leading of which have been set out supra. There is a line of authorities which hold that a revocation of a license is not a punishment but a withdrawal of a privilege.

17 Ency. of Law, p. 267.

And perhaps this is the better way to view it, as the legislature simply grants the privilege on condition that no law will be violated. But whether a forfeiture of a license for a violation of the liquor laws is a punishment or the withdrawal of a privilege, this is clear—*the licensing authority can always revoke a license for a violation of the liquor laws.*

"The authority which granted a license *always* retains the power to revoke it, either for due cause of forfeiture, or upon a change of policy and legislation in regard to the liquor traffic."

Black on Intox. Liq., sec. 189, and cases cited.

Any violation of the liquor laws is sufficient ground of revocation;

17 Ency. of Law, 264, and cases cited;

and selling liquor to minors is a sufficient violation;

17 Ency. of Law, 265, and cases cited;

State vs. Horton, 21 Or. 83, 27 Pac. Rep. 165;

and it is no defense that the licensee has been convicted and punished in a criminal proceeding for the acts which constitute the grounds of revocation, for the licensee might pay his fine and go on in his illegal traffic, and might well afford to do so, making money out of the operation.

Davis vs. Com., 75 Va. 947.

Cherry vs. Com., 78 Va. 375.

17 Ency. of Law, 264.

The statutes of the various jurisdictions relating to forfeitures of licenses may be classified into three general classes:

(1) Unless a statute provides that proceedings shall be instituted to revoke a license after a violation is proved, a conviction of violating the liquor laws, ipso facto, renders the license void and it can no longer afford the licensee any justification or protection.

17 Ency. of Law, 264, and cases cited.

(2) Another line of statutes states that on conviction of the licensee of a violation of the liquor laws, the Court renders a judgment declaring the license forfeited as a consequence of conviction.

17 Ency. of Law, 266, and cases cited.

(3) Still another line of statutes states that formal proceedings are necessary to revoke a license for good cause shown.

17 Ency. of Law, 267, and cases cited.

Whether the Alaskan statute belongs to the first or the second of the classes above, it is not necessary to determine. The record of the case at bar shows that the defendant was convicted by a jury of selling liquor to minors—violating the liquor laws, and under section 478, supra, the penalty for such illegal act is the forfeiture of his license. This penalty has been imposed by the District Court. It is certain that the Alaskan statute does not belong to the third class, for no formal proceedings are necessary to revoke a license for good cause shown. *And only in this third class the authorities hold that the action of a tribunal revoking a license is reviewable because the licensing board and judge must be a party to the proceedings, which it or he is not in the first and second classes of statutes.*

17 Ency. of Law, 26, and cases cited.

People vs. Forbes, 52 Hun, 30.

Com. vs. Wall, 145 Mass. 216, 13 N. E. Rep. 486.

It follows that as the Alaskan statute is not of this third class the judgment under it revoking the defendant's license is not reviewable. But since your Honors have seen fit to grant a supersedeas, we have not argued this view and merely mention it in this place to present in a stronger light our contentions above.

Section 466 of the Alaska Code of Criminal Procedure reads as follows:

"That under the license issued in accordance with this act no intoxicating liquors shall be sold, given or in any way disposed of to any minor, Indian or intoxicated person, or to an habitual drunkard."

No penalty is attached to this statute.

Section 473 of the Alaska Code of Criminal Procedure reads as follows:

"That any person, having obtained a license under this act, who shall violate any of its provisions, shall, upon conviction of such violation, be fined not less than fifty dollars nor more than two hundred dollars, and upon every subsequent conviction of such violation during the year for which such license is issued shall be fined a like amount, and in addition to such fine shall pay a sum equal to twenty-five per centum of the amount of the fine imposed for the offense immediately preceding, and have his license revoked, and in case of nonpayment of the fines and penalties above named shall be imprisoned for a period of time not exceeding six months, or till the same are paid. That after second conviction no license shall thereafter be granted to said party: Provided, that no

minor under sixteen years of age shall be allowed to enter any place where liquors are sold other than retail, without the consent of the parent or guardian of such minor."

Perhaps a sale of liquor to minors under this section would be a sufficient violation of the provisions of the license, yet it does not in express terms apply to such a case. While section 478 of the same code, set out, supra, in this brief, provides a penalty for the sale of liquor to minors. These three sections constitute the law in Alaska in regard to the sale of liquor to minors. Reading them together, the legislative intent is clear that such a sale is a crime and punishable, and as section 478 provides a punishment for this express case, it is the only punishment which can be inflicted for the crime of selling liquor to minors.

Summing up, we respectfully submit that the law abundantly supports the following propositions:

(a) The question of the legality of a trial for a misdemeanor by a jury of six men raises a constitutional question and is only to be passed upon in the Supreme Court of the United States.

(b) The defendant at bar after he obtained his license was bound at his peril, under the statutes of Alaska, to see that it was not violated.

(c) The defendant at bar, having furnished the means of running a saloon business to barkeepers and allowed them to conduct it for him, in his absence, was bound to see that they did not violate the law.

(d) The barkeepers of the defendant having violated the law by selling liquor to minors while in his employment, and acting in the course of that employment, their unlawful act was his unlawful act, their guilty knowledge was his guilty knowledge.

(e) The wording of the Alaskan statute, cited supra, is "*and no licensee shall permit to be sold in his establishment any intoxicating liquor* of any kind to any person under the age of twenty-one years," making the defendant bound at his peril to obey this law. There is no alternative.

(f) Having thus violated the law he is amenable to its penalty. This penalty consists of a forfeiture of his license. Such a statute has been held constitutional and valid.

(g) That under the exercise of the police power the licensing authority has a valid right to revoke a license and take away the privilege when a license violates the law, for the privilege is impliedly granted only on condition that the licensee will not violate the law.

And lastly, if this defendant can sell liquor to the minors of this frontier district, where law and order are hard to enforce, where the officers of the government have long coped, with little success, against crime of all classes, because such a class of men as this defendant utterly disregard the sacred rights of morality and decency to gain unto themselves the dollar, and escape the penalty which the wisdom of the law-making body has written into the statute, then he and others of the same ilk can and will

continue to corrupt our youth, invade the sanctity of our homes and blight the coming generations with the poison which has cursed a thousand times ere this, that they might enrich their pockets.

Owing to the distance from San Francisco and the means of communication from this place, which is only by steamboat, we would not have had time to wait for the appellant's brief, write a reply, have it printed and filed, within the time limited by the rules of the court. And as this brief is intended to be a reply to the appellant's brief without having first seen this brief, it is perhaps of greater length and more extensive than it would otherwise be. But we trust that these inconveniences of communication under which Alaskans live have not caused us to unnecessarily burden the minds of the Court.

So we respectfully and confidently submit that the judgment of the lower court should be affirmed.

JOHN J. BOYCE,

United States Attorney for the District of Alaska, Division No. 1.

No. 1047

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of Marcus Daly, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,
Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Montana.

FILMER BROS., PRINTERS, 424 SANSOME ST., S. F.

INDEX

The Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant and Appellant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of Marcus Daly, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,
Defendants and Appellees.

Caption.

Be it remembered that on the 26th day of February, 1903, the complainant filed its bill of complaint herein, which is entered of final record, as follows, to wit:

THE UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Ninth Circuit and District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of Marcus Daly, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,

Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Montana:

Your orator, the United States of America, by Philander C. Knox, Attorney General of the United States, brings this, its bill of complaint against the Bitter Root

Development Company, a corporation; the Anaconda Mining Company, a corporation; the Anaconda Copper Company, a corporation; the Anaconda Copper Mining Company, a corporation, all organized under and by virtue of the laws of the State of Montana; Margaret P. Daly; Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, citizens of the United States and of the State of Montana, and residents in the State of Montana, and thereupon your orator complains and says:

1. That on the 1st day of April, 1888, said complainant was and is now the owner in fee and in the possession of certain lands in the State of Montana, described as follows, to wit:

Sections twenty-eight (28), twenty-nine (29), thirty-two (32), and thirty-three (33) of township numbered five (5) north, of range numbered eighteen (18) west, of the Montana meridian, in the Missoula land district, State and district of Montana.

The southeast one-fourth (¼) of the southeast one fourth (¼), and the northwest one-fourth (¼) of section twenty (20), and section eighteen (18) of township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

The southeast one-fourth (¼) of the southwest one-fourth (¼), and the southwest one-fourth (¼) of the southeast one-fourth (¼), and lot seven (7) in section

fourteen (14), and the northwest one-fourth (¼) of the northeast one-fourth (¼), and lot two (2) in section twenty-three (23), township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

The southwest one-fourth (¼) of the northwest one-fourth (¼), and the northeast one-fourth (¼) of the southwest one-fourth (¼), and the northwest one-fourth (¼) of the southeast one-fourth (¼), and lot three (3) of section fourteen (14) of township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

The northwest one-fourth (¼) of the southwest one-fourth (¼), and lots three (3), seven (7), and eight (8), in section twenty-five (25), and the southeast one-fourth (¼) of the northeast one-fourth (¼) in section twenty-six (26), township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

The northeast one-fourth (¼) of the southeast one-fourth (¼) of section twenty-seven (27), township three (3) north of range twenty-one (21) west of the Montana meridian.

The northeast one-fourth (¼) of the northeast one-fourth (¼) of section nineteen (19), township two (2) north of range twenty (20) west of the Montana meridian.

The south one-half (½) of the southeast one-fourth (¼) and the south one-half (½) of the southwest one-

fourth (¼) of section twenty-one (21), township three (3) north of range twenty-one (21) west of the Montana meridian.

The west one-half (½) of the northeast one-fourth (¼) of section eighteen (18), township two (2) north of range twenty (20) west of the Montana meridian.

Lots one (1), four (4), and eight (8) in section twenty-three (23) and lot one (1) in section twenty-six (26), township three (3) north of range twenty-one (21) west of the Montana meridian.

The north one-half (½) of the southeast one-fourth (¼) and the northeast one-fourth (¼) of the southwest one-fourth (¼) and the southeast one-fourth (¼) of the northwest one-fourth (¼) of section twenty-one (21), township three (3) north of range twenty-one (21) west of the Montana meridian.

The south one-half (½) of the southeast one-fourth (¼) of section thirty-three (33) and the south one-half (½) of the southwest one-fourth (¼) of section thirty-four (34) in township two (2) north of range twenty- one (21) west of the Montana meridian.

Section four (4) in township one (1) north of range twenty-one (21) west of the Montana medidian.

The northeast one-fourth (¼) of section twenty-eight (28) in township two (2) north of range twenty-one (21) west of the Montana meridian.

Township one (1) north of range twenty-one (21) west of the Montana meridian.

The northeast one-fourth (¼) of the southeast one-fourth (¼) and the west one-half (½) of the southeast

one-fourth (¼) and the southeast one-fourth (¼) of the southwest one-fourth (¼) of section twenty-seven (27) in township two (2) north of range twenty-one (21) west of the Montana meridian.

The northwest one-fourth (¼) of section twenty-seven (27) and the west one-half (½) of the southeast one-fourth (¼) and the southeast one fourth (¼) of the southwest one-fourth (¼) of section twenty-seven (27) in township two (2) north of range twenty-one (21) west of the Montana meridian.

The northeast one-fourth (¼) of the southeast one-fourth (¼) of section eight (8) in township four (4) north of range twenty-one (21) west of the Montana meridian.

Section eighteen (18) and the southeast one-fourth (¼) of the southeast one-fourth (¼) and the northwest one-fourth (¼) of section twenty (20) in township three (3) north of range twenty-one (21) west of the Montana meridian.

Sections seven (7) and eighteen (18) and the west one-half (½) of the northwest one-fourth (¼) and the north one-half (½) of the southwest one-fourth (¼) and the north one-half (½) of the southeast one-fourth (¼) of section seventeen (17) in township four (4) north of range twenty-one (21) west of the Montana meridian, and section thirteen (13) in township four (4) north of range twenty-two (22) west of the Montana meridian.

Township one (1) north, of range twenty-one (21) west, of the Montana meridian.

The southwest one-fourth (¼) and the west half (½) of the southeast one-fourth (¼) of section thirty-three (33), in township two (2) north, of range twenty-one (21) west, of the Montana meridian.

The south half (½) of the northeast one-fourth (¼) and the northeast one-fourth (¼) of the southeast one-fourth (¼) of section twenty-eight (28), township four (4) north, of range twenty-one (21) west, of the Montana meridian.

Section twenty-three (23), in township two (2) north, of range twenty-one (21) west, of the Montana meridian.

The northeast one-fourth (¼) of the southeast one-fourth (¼) of section twenty-three (23), township three (3) north, of range twenty-one (21) west, of the Montana meridian.

The southeast one-fourth (¼) of the northwest one-fourth (¼) of section twenty-seven (27), township three (3) north, of range twenty-one (21) west, of the Montana meridian.

The northwest one-fourth of section twenty-eight (28) and the southeast one-fourth (¼) and the west one-half (½) of the southeast one-fourth (¼) and the southwest one-fourth (¼) of the northeast one-fourth (¼) and the northeast one-fourth (¼) of the northeast one-fourth (¼) of section twenty-one (21) of the northwest one-fourth (¼) of section twenty-two (22), of township two (2) north, of range twenty (20) west, of the Montana meridian.

The north one-half (½) of the northwest one-fourth (¼) and the southwest one-fourth (¼) of the northwest one-fourth (¼) of section twenty (20) and the southeast one fourth (¼) of the northeast one-fourth (¼) of section nine-

teen (19), of township two (2) north, of range twenty (20) west, of the Montana meridian.

The southwest one-fourth (¼) of the northwest one-fourth (¼) of section twenty-seven (27), township four (4) north, of range twenty-one (21) west, of the Montana meridian.

The southwest one-fourth (¼) of section thirty-three (33), township three (3) north, of range twenty-one (21) west, of the Montana meridian.

The southwest one-fourth (¼) of section twenty-two (22), township four (4) north, of range twenty-one (21) west, of the Montana meridian.

The southeast one-fourth (¼) of the northwest one-fourth (¼) and the north one-half (½) of southwest one-fourth (¼) and the southwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty (20), township two (2) north, of range twenty (20) west, of the Montana meridian.

Sections twenty-three (23) and twenty-four (24), township two (2) north, of range twenty-one (21) west, of the Montana meridian.

Section twenty-five (25), township two (2) north, of range twenty-one (21) west, of the Montana meridian.

The west one-half (½) of the northwest one-fourth (¼) of section twenty-one (21), township two (2) north, of range twenty (20) west, of the Montana meridian.

The south one-half (½) of the northeast one-fourth (¼) and the north one-half (½) of the southeast one-fourth (¼) of section twenty (20), township two (2) north, of range twenty (20) west, of the Montana meridian.

The southwest one-fourth (¼) of the southeast one-fourth (¼), and the southeast one-fourth (¼) of the southeast (¼) of section twenty-two (22), and the northeast one-fourth (¼) of the northwest one-fourth (¼), and the northwest one-fourth (¼) of the northeast one-fourth (¼) of section twenty-seven (27), township two (2) north, of range twenty (20) west, of the Montana meridian.

The east one-half (½) of the northeast one-fourth (¼) and the southeast one-fourth (¼) of section twenty-four (24), township two (2) north, of range twenty-one (21) west, of the Montana meridian, and the west one-half (½) of the northeast one-fourth (¼), and lots one (1), two (2), and three (3) of section nineteen (19), and the west one-half (½) of the southeast one-fourth (¼) of section eighteen (18), township two (2) north of range twenty (20) west, of the Montana meridian.

The north one-half (½) of the northeast one-fourth (¼) and the east one-half (½) of the northwest one-fourth (¼) of section twenty-seven (27), township four (4) north, of range twenty-one (21) west, of the Montana meridian.

The northwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-seven (27), township four (4) north, of range twenty-one (21) west, of the Montana meridian. All in the Missoula land district, State and District of Montana.

The southeast one-fourth (¼) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the southeast one-fourth (¼) and lot seven (7) of section fourteen (14), and the northwest one-fourth (¼) of the northeast one-fourth (¼) and lot two (2), township three (3), range

twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The north one-half (½) of the northwest one-fourth (¼) of section twenty-six (26) and the southeast one-fourth (¼) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the southeast one-fourth (¼) of section twenty-three (23), township two (2), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The south one-half (½) of the southwest one-fourth (¼) and the northeast one-fourth (¼) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the southeast one-fourth (¼) of section eleven (11), township four (4), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The north one-half (½) of the southeast one-fourth (¼) and the north one-half (½) of the southwest one-fourth (¼) of section ten (10), range twenty-one (21), township four (4) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The northwest one-fourth (¼) of the southeast one-fourth (¼) and the southeast one-fourth (¼) of the northwest one-fourth (¼) of section eleven (11), township four (4), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The northeast one-fourth (¼) of the northeast one-fourth (¼) of section fifteen (15), township four (4), range twenty-one (21) west, of the Montana meridian,

in the county of Ravalli, State and District of Montana.

The east one-half (½) of the northwest one-fourth (¼) and the east one-half (½) of the southwest one-fourth (¼) of section twenty-eight (28), township six (6), range twenty-one (21), west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The southeast one-fourth (¼) and the west one-half (½) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the northwest one-fourth (¼) of section three (3), township five (5), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The southwest one-fourth (¼) of the northeast one-fourth (¼) and the southeast one-fourth (¼) of the northeast one-fourth (¼) of section fifteen (15) township four (4), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The west one-half (½) of the northeast one-fourth (¼), and the southeast one-fourth (¼) of the northeast one-fourth (¼), and the northeast one-fourth (¼) of the southeast one-fourth (¼) of section thirty-three (33), township six (6), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The northeast one-fourth (¼) and the southeast one-fourth (¼) of section thirty-three (33) and the southwest one-fourth (¼) of section thirty-four (34), township six (6) north, of range twenty-one (21) west, of the

Montana meridian, in the county of Missoula and State and District of Montana.

The southwest one-fourth (¼) of section fifteen (15), township five (5), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

Lands in section two (2), township four (4) north, of range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The southwest one-fourth (¼) of the northwest one-fourth (¼) of section twenty-six (26), and the northwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-six (26), township two (2), range twenty-one (21), west, of the Montana meridian, in the Missoula land district, State and District of Montana.

The southeast one-fourth (¼) of the southeast one-fourth (¼) of section thirty-four (34), and the west one-half (½) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the northwest one-fourth (¼) of section thirty-five (35), township two (2), range twenty (20) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

Land on the east fork of the Bitter Root River, and near what will be when the survey is accepted section twenty-seven (27), township two (2), range twenty (20) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

Lands being on the west fork of the Bitter Root River and which when surveyed will be in township one (1), range twenty-one (21) west, of the Montana

meridian, in the Missoula land district, State and District of Montana.

The southwest one-fourth (¼) of the southeast one-fourth (¼) and the east one-half (½) of the southeast one-fourth of section twenty-seven (27), and the northwest one-fourth (¼) of section thirty-four (34), township three (3) north, of range twenty-one (21), west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The southeast one-fourth (¼) of the southwest one-fourth (¼), and the southwest one-fourth (¼) of the southeast one-fourth (¼), and lot seven (7), of section fourteen (14), and the northwest one-fourth (¼) of the northeast one-fourth (¼), and lot two (2) of section twenty-three (23), township three (3), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The southwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-eight (28), township six (6), range twenty-one (21) west, and the balance of land now claimed in said section twenty-eight (28), by Lee Hyatt, in the Missoula land district, State and District of Montana.

The west half (½) of the northwest one-fourth (¼), and the west half (½) of the southwest one-fourth (¼) of section twenty-eight (28), township six (6), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The northwest one-fourth (¼) of section thirty-three (33), range twenty-one (21) west, of the Montana meri-

dian, in the county of Ravalli, State and District of Montana.

The southwest one-fourth (¼) of section fifteen (15), township five (5) north, of range twenty-one (21) west, of the Montana meridian, in the county of Missoula, State and District of Montana.

The southeast one-fourth of the southwest one-fourth (¼), and the south half (½) of the southeast one-fourth (¼) of section twenty-one (21), and the southwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-two (22), township two (2), range twenty (20) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The east side and adjoining the Bitter Root River in section two (2), township four (4) north, of range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

Lands on the east side of the Bitter Root River, adjoining said river in section two (2), township four (4) north, of range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

Lands situated in township two (2), range twenty (20) west, of the Montana meridian, in the Missoula land district, State of Montana.

Forty acres in township two (2) north, of range twenty-one (21) west, in section thirty-four (34); also one hundred and twenty (120) acres in section three (3), township one (1) north, of range twenty-one (21) west, adjoining the west fork of the river, in the county of Ravalli, State and District of Montana.

The north one-half (½) of section seventeen (17), township one (1) north, of range twenty-one (21) west; the southwest one-fourth (¼) of section twenty (20), township (1) north, of range twenty-one (21) west; the northwest one-fourth (¼) of section twenty (20), township one (1) north, of range twenty-one (21) west; and the north one-half (½) of the northeast one-fourth (¼) of section thirty (30), township one (1) north, of range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The southwest one-fourth of the southwest one-fourth (¼) of section thirty-four (34), and the south one-half (½) of the southeast one-fourth (¼) of section thirty-three (33), township two (2) north, of range twenty-one (21) west, and the northeast one-fourth (¼) of the northeast one-fourth (¼) of section (4), township one (1) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

Lands situate, lying and being in township one (1), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

The north one-half (½) of the northwest one-fourth (¼) of section twenty-six (26), and the southeast one-fourth (¼) of the southwest one-fourth (¼), and the southwest one-fourth (¼) of the southeast one-fourth (¼) of section twenty-three (23), township two (2), range twenty-one (21) west, of the Montana meridian, in the county of Ravalli, State and District of Montana.

Lands situate, lying and being in sections twenty-five (25) and thirty (30), township one (1) north, of range

twenty-one (21) west, and township one (1), north, of range twenty-two west, of the Montana meridian, in the Missoula land district, State and District of Montana.

Lands lying in the east side of the south fork of the Bitter Root River, in the Missoula land district, State and District of Montana, a more particular description of which said land is to your orator unknown.

The north one-half ($\frac{1}{2}$) of section four (4), township one (1) north, of range twenty-one (21) west; the southeast one-fourth ($\frac{1}{4}$) of the southeast one-fourth ($\frac{1}{4}$) of section five (5), township one (1) north, of range twenty-one (21) west; the northeast one-fourth ($\frac{1}{4}$) of section eight (8), township one (1) north, of range twenty-one (21) west; and the northwest one-fourth ($\frac{1}{4}$) of section nine (9), township one (1) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

Lands within the boundaries of the Bitter Root Forest Reserves and will be when surveyed in townships one (1) north and one (1) south, range twenty-two (22) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

Lands within the boundaries of the Bitter Root Forest Reserves and will be, when surveyed, in townships No. one (1) north, and No. one (1) south, range No. twenty-two (22) west, of the Montana meridian, in the Missoula land district, State and District of Montana.

Unsurveyed lands as follows:

Lands lying on the East Fork of the Bitter Root River in township one (1) north, of range twenty (20) west, of the Montana meridian, and adjoining the claim of Herbert Lord on the East Fork of the Bitter Root River, in the Missoula land district, a more particular description of which said lands is to your orator unknown.

One hundred and sixty acres of unsurveyed land on the East Fork of the Bitter Root River, in the Missoula land district, State and District of Montana, a more particular description of which said land is to your orator unknown.

Lands situated about one mile east of White's Hot Springs, in a canyon about one-fifth of a mile wide and extending one-half of a mile along the East Fork of the Bitter Root River, in the Missoula land district, State and District of Montana.

One hundred and sixty acres of unsurveyed land on the main road from Darby to Sula, Montana, adjoining the East Fork of Bitter Root River and one and a half miles southeast of section thirty-four, township two (2) north, of range twenty west, of Montana meridian.

Lands situated about one mile east of Wile's Hot Springs and extends one mile along both banks of the East Fork of Bitter Root River, in the Missoula land district, State and District of Montana, a more particular description of which said land is to your orator unknown.

One hundred and sixty acres on the main road from Darby to Sula, Montana, and adjoining the East Fork

of the Bitter Root River, and two miles southeast of section thirty-four (34), township two (2) north, of range twenty (20) west, of the Montana meridian, State and District of Montana, a more definite description of which said land is to your orator unknown.

One hundred and sixty acres on the main road from Darby to Sula, Montana, and adjoining the East Fork of the Bitter Root River, and two and one-half miles southeast of section thirty-four (34), township two (2) north, of range twenty (20) west, of the Montana meridian, in the Missoula land district, State and District of Montana, a more particular description of which said land is unknown to your orator.

A strip of unsurveyed land beginning one-fourth of a mile from squatter claim of T. W. Laird; that is, one-half mile south of W. P. Bean land in section thirty-four (34), township two (2) north, of range twenty (20) west, of the Montana meridian, and extending up Laird Creek that empties into the East Fork of Bitter Root River, and also on the mountain on the north side of said creek in the Missoula land district, State and District of Montana, a more definite description of which said land is to your orator unknown.

2. Your orator further shows that on the day and year last aforesaid on these vast tracts of land there were then growing and standing great forests of pine, fir, and other kinds of trees of various dimensions, fit to manufacture into lumber for mining, commercial, and all other purposes for which lumber is used; that said forests were of great value, to wit, of the value of two million dollars ($2,000,000) and upwards, the ex-

act value thereof being to your orator unknown; that these forests and the land upon which they were growing and standing were the absolute property of the complainant, the United States of America, and was a portion of its public domain.

3. Your orator further shows that on this the day of filing its bill of complaint in this court the lands above described have for the most part been stripped of the pine and other trees and timber that were standing and growing up them as aforesaid, and, except very small portions thereof, were so denuded without license, authority, or permission of the United States or anyone authorized to represent the complainant; and this was done in violation of its laws, both civil and criminal, and thereby and in consequence of said spoliation the complainant has lost millions of dollars' worth of its property under circumstances named in the succeeding paragraphs of this bill of complaint.

4. Your orator further shows that one Marcus Daly, who is now dead, but who was on the date and year aforesaid a citizen of the State of Montana, and a resident thereof, well knowing of the location of these lands, their accessibility, and the great value of the timber then growing thereon, did on or about the 1st day of January, 1890, determine that he would convert and appropriate to his own use all of the merchantable and marketable timber growing and standing thereon, without buying said timber or obtaining any right or authority, except as hereinafter stated, from your orator, the United States of America. That in order to more effectually carry out these designs and purposes,

to conceal his identity, to enrich himself individually, to escape personal liability, and to better deceive the public and the lawful officers and agents of the complainant, he determined that he would organize a corporation under the laws of the State of Montana; and for that purpose the said Daly called to his aid and assistance certain other persons, namely, John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long, and by conspiracy and confederation with said parties, and in pursuance of such fraudulent purpose as aforesaid, they organized, on or about the 12th day of August, 1890, the Bitter Root Development Company, the defendant. In its articles of incorporation, which were duly filed with the secretary of the State of Montana, said John R. Toole, William Toole, and James W. Hamilton were named as incorporators, and James W. Hamilton, William Toole, Daniel J. Hennessy, John R. Toole, and William W. Dixon were named as trustees to manage the affairs of the company for the first three months of its existence, and the town of Hamilton, in said State, was named as the principal office of said corporation. The capital stock of said corporation was fixed at the sum of three hundred thousand dollars ($300,000.00), divided into one hundred thousand shares, of the par value of three dollars ($3.00) per share.

5. Your orator further shows that said incorporators and trustees had but a nominal interest in said corpo-

ration, but certain of them were agents, and others attorneys of said Marcus Daly, and as such conspired with him as to the manner and means by which his said purpose to denude said lands of your orator could be best carried out. In pursuance of such conspiracy it was necessary that a certain number should subscribe for stock in said corporation, which was done, but all of said shares were in fact subscribed for the use of and controlled by said Marcus Daly. Your orator charges that not only in the formation of said corporation and other corporations to be hereinafter named said John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long aided and assisted said Marcus Daly, but in many other ways up to the time of his death they engaged with him in the work of spoliation, which, in pursuance of such conspiracy had been planned and was later carried out as hereinafter particularly described; and said parties other than Daly participated in the profits thereof, but just how, and to what extent is to your orator unknown; and your orator shows that such of the above as are not made defendants herein are either dead, outside of the jurisdiction of this court, or have no estate.

6. Your orator further shows that at once on the organization of this corporation, and under the corporate name thereof, said parties heretofore namead commenced the work of cutting and carrying away from said lands the trees and timber then growing and stand-

ing thereon, using at first in their operations several portable sawmills, but later, on or about the year 1892, a large lumber and sawmill was erected at the town of Hamilton, on Bitter Root River, in close proximity to a portion of the lands above described and the timber growing thereon. The work of cutting, hauling, transporting to the river, and driving the timber to said mill and manufacturing the same into lumber was prosecuted with great and unremitting industry for several years thereafter, to the great profit and advantage of the said conspirators and to the great loss of your orator.

7. Your orator further shows that not only at the time of the organization of said corporation, but at all times while it was doing business, its officers, directors, trustees, and stockholders acted for and in behalf of said Marcus Daly, as his agents, and had knowledge of its principal operations, and well knew that the logs that were being brought to its mill and converted into lumber were taken, without right or authority, from the public domain of your orator, and that they had no legal right or title to the same, except as to a small fraction thereof, as hereinafter stated.

8. Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by the other parties and as aforesaid, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations apply to and obtain from

the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and under cover of such permits said conspirators not only cut, carried away, and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, they willfully and fraudulently entered upon large tracts of lands adjacent thereto and cut, carried away, drove, and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown and known only to said Marcus Daly, his said agents, and the officers of said Bitter Root Development Company, and appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom beside said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time, it is impossible for your orator to say, as all books of account, of every kind and character, were then and are now in their possession, under their control, or with their assigns.

9. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and the other parties before mentioned, engaged the services of a large number of men, falsely representing that they had authority from your orator to cut the growing timber on tracts of land not included in any license, and made contracts with such men by the terms

of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts and enable them to successfully prosecute the same.

10. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, the said Daly and his associates, acting through and under the corporate name of the defendant, Bitter Root Development Company, entered into other contracts or agreements with other parties, namely, Kendall Brothers, Harper Brothers, G. L. Shook, William Toole, Andrew Kennedy, D. V. Bean, John Ailport, and divers other persons to your orator unknown, by the terms of which they were to be paid specified prices per thousand feet, board measure, for logs delivered at the sawmill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to your orator and was to be unlawfully cut and removed. Said contractors, so-called, acting for and in behalf of said Marcus Daly and his said confederates, under the name of the Bitter Root Development Company, during the year 1891 and for several years next thereafter, willfully trespassed upon the hereinbefore described lands of the complainant, cutting millions of feet of logs, and hauling them to the Bitter Root River, and thence to the mill of the defendant, Bitter Root Development

Company, at Hamilton, where they were converted into lumber and sold to the general public, and the proceeds thereof appropriated in large part by said Marcus Daly, and the balance by his associates in said conspiracy, but just how much, and in what proportion, your orator, for the reasons above stated, is unable to say.

11. Your orator further shows that the said Marcus Daly and his associates, in further execution of said conspiracy, organized other corporations for the purpose of concealing their illegal acts and complicating and confusing the situation, so as to make detection and proof of the same difficult, if not impossible. One of these schemes was as follows: On or about the 14th day of January, 1891, they organized a corporation known as the Anaconda Mining Company, with an organized capital stock of $12,500,000, divided into 500,000 shares of the par value of $25 per share. That within less than one year thereafter, namely, on the 5th day of December, 1891, a stockholders' meeting was held in the city of Butte, Montana, and at said meeting the capital stock of said corporation was increased to twenty-five million dollars (25,000,000.00) and the shares thereof increased to one million (1,000,000) shares. That at said stockholders' meeting it appeared that no one of the incorporators or the trustees that were named at the time of its incorporation a few months before had any substantial interest therein; and later, namely, on the 31st day of December, another meeting of said stockholders was held, at which time it was voted to extend the term of existence of said corpora-

tion for forty years from the date of its original incorporation, and at that meeting it appeared that Marcus Daly, either in his own person, or as trustee, or as a proxy, controlled nearly seven hundred thousand (700,000) shares of the million shares of the capital stock of said company, and in less than six months thereafter the capital stock was reduced from twenty-five million dollars ($25,000,000.00) to one million dollars ($1,000,000.00), and the shares from one million (1,000,000) to forty thousand 40,000).

12. Your orator further shows that in furtherance of the conspiracy aforesaid, the said Marcus Daly, on the 27th day of April, 1894, through his agents, procured to be conveyed unto himself all of the property of said Bitter Root Development Company, receiving a deed from said Bitter Root Development Company, executed by William Toole as its president and Joseph Kerrigan as its secretary, which said deed was duly recorded on page 302 of Book 16, in the proper office for the recording of deeds in the county of Ravalli, State of Montana. In said deed appear these words: "The Bitter Root Development Company, for and in consideration of one dollar, transfers all of its property of every kind and description, real and personal, timber lands, timber-cutting privileges, and rights, timber, logs, mills, water rights, and water ditches, flumes, pipe lines, and rights of way—in fact everything belonging to the Bitter Root Development Company, to Marcus Daly."

Your orator further says that four days after so receiving this deed, namely, on the 1st day of May,

1894, said Marcus Daly deeded this same property to the other of his corporations, the above-named Anaconda Mining Company, for the express consideration of one million four hundred and forty-two thousand three hundred and seventy-nine dollars and forty-six cents ($1,442,379.46), which said deed was duly recorded in said book 16, on page 280. Your orator expressly charges that said Marcus Daly did in fact receive the consideration named in said deed, the whole thereof being directly the result of the spoliation of the lands of your orator as aforesaid, and that the moneys so received by him belonged in fact to your orator; but your orator charges on information that said Marcus Daly did not receive all of the same in cash, but a portion of same was taken in stock in said Anaconda Mining Company, but just how much he received in cash and how much was carried over and appeared in stock of said company your orator is unable to state.

13. Your orator further shows that in furtherance of the conspiracy aforesaid, said defendants, Moses Kirkpatrick, William Scallon, and Malcolm B. Bromley, acting for and in behalf of said Marcus Daly, on the 6th day of June, 1895, pursuant to and in conformity with the statutes of Montana relating to corporations for industrial and productive purposes, organized the Anaconda Copper Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into three hundred thousand (300,000) shares of the par value of one hundred dollars ($100.00) each, with an authorized term of existence of forty years, and the following-named persons were named as trus-

tees for the first three months of its existence, to wit, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessey, and Joseph V. Long, with its principal office at Butte,, Silverbow County, Montana.

14. Your orator further shows that nine days thereafter the same persons, named as incorporators of the corporation last named, organized under the same law the defendant corporation, the Anaconda Copper Mining Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into one million two hundred thousand shares (1,200,000) of the par value of twenty-five dollars ($25.00) each, with the same seven trustees to manage the affairs of said corporation for the first three months of its existence, with its principal office at Anacondda, in said State.

15. Your orator shows that in the execution of said conspiracy, and for the purpose of complicating the situation, said Marcus Daly, through his agents, did again, and within one year and twenty-nine days after having transferred his property to the Anaconda Mining Company, convey the identical property that was named in said deeds to the above-named Anaconda Copper Mining Company for and in consideration of the sum of one dollar, the Anaconda Mining Company executing a deed through and by its president, W. W. Dixon, and its secretary, F. E. Sergeant, and said deed is recorded in the same book of records on page 441.

16. Your orator further shows and charges that these several conveyances were made in the main in furtherance of said conspiracy, and in pursuance of a

purpose to so complicate the situation as to make detection difficult, if not impossible. That the conveyance by the Bitter Root Development Company to said Marcus Daly, for one dollar, of all of its property was fraudulent, and that said Marcus Daly did, under the name of the Anaconda Mining Company, carry on the same work of spoliation of your orator's trees, timber, and lands, and that later, and from the time of the conveyance of all its corporate property to the Anaconda Copper Mining Company, he carried on the work under that name until the date of his death. That he continued to use the same means, the same mill at Hamilton, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same. And your orator expressly charges that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations, or was appropriated by Marcus Daly and his assistants to their own use and benefit; but just how much was carried over in the said corporations, and how much was divided previous to the last deed named herein, and how much of the property of your orator was converted by said last-named company between the date of its organization and the death of said Marcus Daly hereinafter described, and how much thereof was appropriated by said company, and how much by Daly and his associates, it is impossible for your orator, with the means at hand, to state.

17. Your orator further shows that by reason of such spoliation, continued and carried on during the period of about ten years, it has lost property of great value, to wit, of the value of two million dollars and upwards, and that Marcus Daly and the other defendants named herein occasioned this loss by willfully trespassing upon said lands of your orator, and without its consent, or the consent of any of its authorized officers, and in violation of its laws, both civil and criminal, appropriated and converted to their own use the trees and timber growing thereon. That said defendants, or some of them, have had at all times, and now have possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them; but by reason of the frauds practiced by said defendants, as aforesaid, and their acts performed for the express purpose of concealing from your orator the facts of the case by means of the formation and the dissolving and the reforming of corporations, and by reason of said defendants having possession of all books of account it is impossible for your orator to set forth to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when and to whom the logs when manufactured into lumber were sold, or just when and by whom the proceeds thereof were obtained and when the same were divided.

18. Your orator further shows that at the time that these trespasses were committed the territory on which the same took place was but sparsely settled, and was thousands of miles away from the seat of government, and it was impossible with the means that your orator had at hand to properly patrol and protect its domain from the willful trespasses of the defendants, and that the Government of the United States used such care in the protection thereof as it had the means to do. That the agents employed by your orator were misled by the defendants' assertion of ownership, as aforesaid; that the frauds and trespasses of the defendants, which have resulted in the denuding of these lands of your orator and in depriving your orator of property of the value of several millions of dollars, were not discovered in their entirety until a comparatively short time ago.

19. Your orator further shows that it has commenced several actions at law in this Honorable Court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court, but that by reason of the frauds and conspiracies above set forth, and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given your orator by said actions at law, and your orator is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

20. Your orator further shows that Marcus Daly died in the city of New York on the 12th day of Novem-

ber, A. D. 1900; that at the time of his death he was a resident of the county of Deer Lodge, State and District of Montana, and left an estate worth about $12,000,000, consisting of real and personal property located in said county and State and elsewhere. And your orator expressly charges that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator, as hereinbefore charged, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit; that in his lifetime he made and published his last will and testament whereby he appointed the defendant, Margaret P. Daly, executrix thereof; that on the 14th day of February, A. D. 1901, at the city of Anaconda, said last will and testament was duly proved and duly admitted to probate in the District Court of the county of Deerlodge, District of Montana; that thereupon, on the 15th day of February, A. D. 1901, letters of administration were duly issued thereon to the said defendant, Margaret P. Daly, by the said court; that the said defendant, Margaret P. Daly, duly qualified and entered upon the discharge of her duties as executrix, and that the said letters testamentary have not been revoked, and are now in full force and effect.

21. Your orator further shows that the said Margaret P. Daly, under and by virtue of the terms of said will and as the wife of said Marcus Daly, is now the owner of a large portion of his estate.

In consideration whereof, and for as much as your orator is, for the reasons stated, remediless in the

premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relievable, to the end that your orator may have that relief which it can only obtain in a court of equity; and that each one of the defendants above named may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator prays the court as follows:

First.—That the defendant, Margaret P. Daly, both in her own person, and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for the use and benefit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

Second.—That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains, and advantages which the said defendants, or either of them, have received or made or which have arisen or accrued to them, or either of them, by reason of the willful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

Third.—That each of the defendants may make a full and true discovery and disclosure of and concern-

ing the transactions and matters aforesaid, and that an accounting may be taken by and under the direction and decree of this Honorable Court of all the dealings and transactions between your orator and the defendants. That on such accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon.

Fourth.—That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the sawmill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits, and advantages which the said defendants, or either of them, or the estate of said Marcus Daly have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

Fifth.—That the said defendants and each of them discover and set forth full, true, and particular accounts

of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their, use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from whom each and every of such sums were, respectively, received, and how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

Sixth.—That the defendants, and each of them, may set forth a list or schedule and description of all books of account of every kind and character, and of all deeds, documents, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which are now or ever were in their or either of their possession or power, and more particularly described, which now are in their or either of their possession or power, and may deposit the same with the clerk of this court or with the standing master in chancery thereof for the purposes of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your orator may as-

certain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator as aforesaid, that this Court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require and as may be agreeable to equity and good conscience.

May it please the Court to grant to your orator a writ of subpoena to be directed to the said Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; Bitter Root Development Company, Anaconda Mining Company, Anaconda Copper Company, Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon, Daniel J. Hennessy, thereby commanding them, and each of them, at a certain time, and under a certain penalty to be fixed, personally to appear before this Honorable Court, and then and there full, true,

direct, and perfect answer to make to all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall be meet and agreeable to equity, and your orator will ever pray.

T. C. KNOX,

Attorney General of the United States.

J. K. RICHARDS,

Solicitor General of the United States.

FRED A. MAYNARD,

Special Assistant United States Attorney, Solicitor for Complainant.

CARL RASCH,

United States Attorney and Solicitor for Complainant.

M. C. BURCH,

Of Counsel.

No. 207. The United States of America. The Circuit Court of the United States for the Ninth Circuit and District of Montana. In Equity. The United States of America, Complainant, vs. Bitter Root Development Company, a Corporation; Anaconda Mining Company, a Corporation; Anaconda Copper Company, a Corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, Deceased; John R. Toole, William W. Dixon, William Scallon, and

Daniel J. Hennessy, Defendants. Filed Feb. 26, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of March, 1903, a subpoena in equity was issued herein, which is entered of final record, as follows, to wit:

Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting, to Bitter Root Development Company, a Corporation; Anaconda Mining Company, a Corporation; Anaconda Copper Company, a Corporation; Anaconda Copper Mining Company, a Corporation; Margaret P. Daly; Margaret P. Daly, as Executrix of the Last Will and Testament of Marcus Daly, Deceased; John R. Toole; William W. Dixon; William Scallon; and Daniel J. Hennessy, Defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Butte, on the 6th day of April, A. D., 1903, to answer a bill of complaint exhibited against you in said court by the United States of America, Complainant, and to do and receive what the said Court shall have considered in that behalf. And this your are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 26th day of February, in the year of our Lord one thousand nine hundred and three, and of our Independence, the 127th.

[Seal] GEO. W. SPROULE,
Clerk.

By ————————,
Deputy Clerk,

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of April next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal] GEO. W. SPROULE,
Clerk.

By ————————,
Deputy Clerk,

P. C. KNOX,
United States Attorney General,

J. K. RICHARDS,
Solicitor General,

F. A. MAYNARD,
Special Assistant United States Attorney, Solicitor for Complainant.

CARL RASCH,
United States Attorney, Helena, Montana.

M. C. BURCH,
Of Counsel.

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within writ on the 28th day of February, 1903, and personally served the same on the 3d day of March, 1903, by delivering to, and leaving with D. J. Hennessy at Butte; Mrs. M. Daly, March 4th; Mrs. M. P. Daly, as executrix of the last will and testament of M. Daly, deceased at Anaconda, Wm. Scallon at Butte, March 10th, 1903, and the Anaconda Copper Mining Co., by Wm. Scallon, Prest., and on J. R. Toole, March 16, 1903, at Anaconda, Mont., said defendants named therein personally, in said district, a copy thereof; after due search am unable to find the Bitter Root Development Co., Anaconda Mining Company, The Anaconda Copper Co., and W. W. Dixon in my district.

C. F. LLOYD,
United States Marshal.
By E. D. Elderkin,
Deputy.

Butte, March 17, 1903.

[Endorsed]: No. 207. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. United States of America vs. Bitter Root Development Co. et al. Subpoena. Filed March 17th, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 24th day of June, 1903, separate demurrer of Anaconda Copper Mining

Company, a corporation, John R. Toole, William W. Dixon, William Scallan and Daniel J. Hennessy was filed herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA, Complainant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING CO. (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of MARCUS DALY, Deceased; JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY, Defendants.

No. 207.

Separate Demurrer of Anaconda Copper Mining Company, a Corporation, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy.

Now comes the Anaconda Copper Mining Company, a corporation, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, defendants in the above-

entitled suit, and not confessing or acknowledging all or any of the matters or things in complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do separately and for themselves an each of them demur to the bill of complaint of complainant therein, and for causes of demurrer show:

I.

That the said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that the complainant has a full, complete and adequate remedy at law by action at law for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate and complete remedy for any discovery necessary or practicable by proceeding in such action at law.

II.

That the complainant is not entitled to any discovery herein because:

(1.) The bill shows upon its face that the complainant has a full, complete and adequate remedy at law, and is therefore not entitled to any discovery.

(2.) That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore defendants herein are not compellable to give any discovery herein, or to answer said bill, or to produce any papers, books, documents or accounts relating to the matters and things stated in said bill, because to

do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3.) The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4.) The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants, or any of them, are parties to, or defendants in, an action at law relating to the matters set forth in the bill.

III.

The bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor is it sufficiently averred how said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were dis-

covered or the means used to conceal the alleged frauds from the complainant; nor the diligence with which the alleged frauds were investigated by the complainant.

The bill contains mere loose, general and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled or injured by any acts of the defendants.

IV.

The bill shows upon its fact that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it might be entitled instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want thereof, in relation to the matters stated in the bill.

V.

Said bill is uncertain and insufficient:

(1.) As to the allegations of conspiracy and fraud on the part of the defendants, in that it is not shown what

were the acts constituting the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant any facts in the case.

The allegations are general and indefinite, and do not state how the alleged frauds were perpetrated, or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how the said frauds or any acts of the defendants were concealed from the complainant.

(2.) It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants, or any of them, are parties or defendants to such alleged actions at law, or any of them.

(3.) The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed lands, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands, as well

as from other lands, although knowledge of such licenses or permits was and is peculiarly within the knowledge of the complainant.

(4.) Said bill is in many other respects uncertain, informal and insufficient.

VI.

And for further causes to be stated at the hearing of this bill.

Wherefore, these defendants separately demur to said bill and to all of the matters and things therein contained, and pray the judgment of this Honorable Court whether they shall be compelled to make any further or other answer thereto; and pray to be dismissed with their costs in this behalf sustained.

A. J. SHORES and
C. F. KELLEY,
Solicitors for said Defendants.

W. W. DIXON and
A. J. SHORES,
Of Counsel for said Defendants.

We certify that, in our opinion, the foregoing demurrer of the defendants, Anaconda Copper Mining Company, a corporation, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, to the bill of complaint of the United States of America is well founded in point of law, and proper to be filed in said cause.

W. W. DIXON and
A. J. SHORES,
Of Counsel for said Defendants.

The United States of America,
Ninth Circuit,
District of Montana,
State of Montana,
County of Silver Bow. } ss.

William W. Dixon, being duly sworn, says:That he is one of the defendants to the bill of complaint of the United States of America in this suit; that he has read the foregoing demurrer, and that the same is not interposed for delay. WILLIAM W. DIXON.

Subscribed and sworn to before me this 22d day of June, 1903.

[Seal] WILL HARDCASTLE,
Notary Public in and for Silver Bow County, State of Montana.

Service of the foregoing demurrer acknowledged, and copy received this 24th day of June, 1903.

CARL RASCH,
United States Attorney,
Solicitors for Complainant.

[Endorsed] No. 207. Circuit Court, United States, Ninth Circuit, District of Montana. United States of America, Complainant, vs. Bitter Root Development Co., a Corporation, Anaconda Mining Company, a Corporation, et al., Defendants. Separate demurrer of Anaconda Copper Mining Company, a Corporation; John R. Toole, W. W. Dixon, Wm. Scallon, and Daniel J.Hennessy. Filed June 24, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 1st day of August, 1903, Margaret P. Daly and Margaret P. Daly, as executrix

of the last will and testament of Marcus Daly, deceased, filed her separate demurrer herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA, Complainant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation, ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING CO. (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of MARCUS DALY, Deceased; JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY, Defendants. } No. 207.

Separate Demurrer of Margaret P. Daly, and Margaret P. Daly, as Executrix of the Last Will and Testament of Marcus Daly, Deceased.

Now comes Margaret P. Daly, for herself, and as executrix of the last will and testament of

Marcus Daly, deceased, defendants in the above-entitled suit, and not confessing or acknowledging all or any of the matters or things in complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, does for herself, and as such executrix, demur to the bill of complaint of complainant herein, and for causes of demurrer shows:

I.

That the said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that the complainant has a full, complete and adequate remedy at law by action at law for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate and complete remedy for any discovery necessary or practicable by proceeding in such action at law.

II.

That the complainant is not entitled to any discovery herein because:

(1.) The bill shows upon its face that the complainant has a full, complete and adequate remedy at law, and is therefore not entitled to any discovery.

(2.) That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore defendants herein are not compellable to give any discovery herein, or to answer said bill, or to produce any papers, books, documents or accounts relating to the matters and things stated in said bill, because to

do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3.) The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4.) The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants, or any of them, are parties to, or defendants in, any action at law relating to the matters set forth in the bill.

III.

The bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor is it sufficiently averred how said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds

from the complainant; nor the diligence with which the alleged frauds were investigated by the complainant.

The bill contains mere loose, general and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled or injured, by any acts of the defendants.

IV.

The bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it might be entitled instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want thereof, in relation to the matters stated in the bill.

V.

Said bill is uncertain and insufficient:

(1). As to the allegations of conspiracy and fraud on the part of the defendants, in that it is not shown what were the acts constituting the conspiracy and

fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant any facts in the case.

The allegations are general and indefinite, and do not state how the alleged frauds were perpetrated, or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how the said frauds or any acts of the defendants were concealed from the complainant.

(2). It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants or any of them are parties or defendants to such alleged actions at law, or any of them.

(3). The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed lands, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands as well as from other lands, although knowledge of such li-

censes or permits was and is peculiarly within the knowledge of the complainant.

(4). Said bill is in many other respects uncertain, informal and insufficient.

VI.

And for further cause to be stated at the hearing of this bill.

Wherefore, the defendant, Margaret P. Daly, for herself and as executrix of the last will and testament of Marcus Daly, deceased, separately demurs to said bill and to all of the matters and things therein contained, and prays the judgment of this Honorable Court whether she shall be compelled to make any further or other answer thereto; and prays to be dismissed with her costs in this behalf sustained.

_____.

A. J. CAMPBELL,
Solicitors for Said Defendants.

_____,

Of Counsel for Defendants.

I hereby certify that in my opinion the foregoing demurrer of the defendants, Margaret P. Daly and Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased, to the bill of complaint of the United States of America, is well founded in point of law, and proper to be filed in said cause.

A. J. CAMPBELL,
Of Counsel for Said Defendants.

The United States of America,
Ninth Circuit,
District of Montana,
State of Montana,
County of Ravalli. } ss.

Margaret P. Daly, being duly sworn, says: That she is one of the defendants to the bill of complaint of the United States of America in this suit; that she has read the foregoing demurrer, and that the same is not interposed for delay.

MARGARET P. DALY.

Subscribed and sworn to before me this 29th day of July, A. D. 1903.

[Seal] ROBERT A. O'HARA,
Notary Public in and for Ravalli County, State of Montana.

Service of the foregoing demurrer acknowledged, and copy received this 31st day of July, A. D. 1903.

A. J. CAMPBELL,
Solicitors for Complainant.

[Endorsed]: No. 207. In the Circuit Court of the United States, Ninth Circuit, District of Montana. In Equity. The United States of America, Complainant, vs. Bitter Root Development Company, a corporation, et al., Defendants. Separate Demurrer of Margaret P. Daly, and Margaret P. Daly, as Executrix of the last will and testament of Marcus Daly, deceased. Filed Aug. 1, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of February, 1904, an order sustaining said demurrers was duly made and entered herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Friday, February 26th, 1904.—In Open Court.

UNITED STATES OF AMERICA

vs.

BITTER ROOT DEVELOPMENT COMPANY et al.

Order Sustaining Demurrers.

This cause heretofore submitted to the Court upon demurrers of defendants, Anaconda Copper Mining Company, a corporation; John R. Toole, W. W. Dixon, Wm. Scallon and Daniel J. Hennessy; and Margaret P. Daly, and Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased, came on regularly at this time for the judgment and decision of the Court, and after due consideration it is ordered that said demurrers be, and the same hereby are, sustained, and complainant thereupon granted five days' time within which to further plead or consider as to further action herein.

Attest—a true and correct copy.

GEO. W. SPROULE,
Clerk.

And thereafter, to wit, on the 3d day of March, 1904, a final decree was duly made and entered herein, which is entered of final record, as follows, to wit:

THE UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Ninth Circuit and District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA, Complainant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of MARCUS DALY, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, DANIEL J. HENNESSY, and ANACONDA COPPER COMPANY (a Corporation), Defendants.

Final Decree.

In this cause the demurrers of the said defendants, Margaret P. Daly, Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased, Anaconda Copper Mining Company, a corporation, John R. Toole, William W. Dixon, William Scallon and Daniel

J. Hennessy, to the said complainant's bill of complaint came duly on for hearing, and was argued by counsel for the respective parties, and the premises being seen and fully understood it is ordered, adjudged and decreed by the Court that said demurrers be and the same are hereby sustained; and the said complainant thereupon waiving in open court the right to further amend its said bill of complaint, it is thereupon further ordered, adjudged and decreed by the Court that said bill of complaint be and the same is hereby dismissed.

It appears from the return of the marshal that, after diligent search, no service of process could be had on said defendants, Bitter Root Development Company, a corporation, Anaconda Mining Company, a Corporation, Anaconda Copper Company, a corporation, as they could not be found.

Dated March 3d, 1904.

HIRAM KNOWLES,
District Judge.

[Endorsed]: Title of Court and Cause. Order of Dismissal. Filed and Entered March 3d, 1904. Geo. W. Sproule, Clerk.

Clerk's Certificate to Enrolled Papers.

Wherefore, said pleadings, process and final decree are entered of final record, herein, in accordance with the law and practice of this Court.

Witness my hand and the seal of said Court this 3d day of March, 1904.

[Seal] GEO. W. SPROULE,
Clerk.

And thereafter, to wit, on the 3d day of March, 1904, the complainant filed its assignment of error herein, which is in the words and figures as follows, to wit:

THE UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Ninth Circuit and District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Last Will and Testament of MARCUS DALY, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,
Defendants.

Assignment of Errors.

And now comes the complainant and says that in the record and proceedings of the said court in the the above-entitled cause, and in the final decree made and entered therein, on the 26th day of February, A. D.

1904, there is manifest error, and for error the said complainant assigns the following:

First.—The Court erred in that it did not hold that the bill of complaint states a good cause of action to which the defendants should be required to file their answers or pleas.

Second.—The Court erred in holding that the bill of complaint states no cause for relief in a court of equity.

Third.—The Court erred in refusing to grant the relief as prayed for in complainant's bill.

Fourth.—The Court erred in sustaining the demurrers of defendants Margaret P. Daly, Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; Anaconda Copper Mining Company, a corporation; John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, and directing that the bill of complaint be dismissed.

Fifth.—The Court erred in not overruling paragraph I of said demurrer, which states that the said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that said complainant has a full, complete and adequate remedy at law by action at law for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate and complete remedy for any discovery necessary or practicable by proceedings in such action at law.

Sixth.—The Court erred in not overruling paragraph II of said demurrer, which states that the complainant is not entitled to any discovery herein because:

(1). The bill shows upon its face that the complainant has a full, complete and adequate remedy at law, and is therefore not entitled to any discovery.

(2). That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore defendants herein are not compellable to give any discovery herein, or to answer said bill, or to produce any papers, books, documents or accounts relating to the matters and things stated in said bill, because to do so, might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3). The bill alleges that some of the defendants were attorenys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4). The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants or any of them, are parties to, or defendants in, any action at law relating to the matters set forth in the bill.

Seventh.—The Court erred in not overruling the third paragraph of said demurrer, which states that the bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in that the bill does not show how any of the al-

leged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor that it is sufficiently averred how said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds from the complainant; nor the diligence with which the alleged frauds were investigated by the complainant.

That the bill contains mere loose, general and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled or injured by any acts of the defendants.

Eighth.—The Court erred in not overruling the fourth paragraph of said demurrer which states that the bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it

might be entitled instead of delaying proceedings until as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want thereof, in relation to the matters stated in the bill.

Ninth.—The Court erred in not overruling the fifth paragraph of said demurrer, which states that said bill is uncertain and insufficient:

(1.) As to the allegations of conspiracy and fraud on the part of the defendants, in that it is not shown what were the acts constituting the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant any facts in the case.

That the allegations are general and indefinite, and do not state how the alleged frauds were perpetrated. or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how said frauds or any acts of the defendants were concealed from the complainant.

(2.) It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from

the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants or any of them are parties or defendants to such alleged actions at law, or any of them.

(3.) The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed lands, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands as well as from other lands, although knowledge of such licenses or permits was and is peculiarly within the knowledge of the complainant.

(4). Said bill is in many other respects uncertain, informal and insufficient.

Wherefore, the complainant prays that the said decree be reversed.

P. C. KNOX,
Attorney General of the United States,

M. C. BURCH,
United States Attorney,
CARL RASCH,
United States Attorney for the District of Montana,
FRED A. MAYNARD,
Special Assistant United States Attorney for the District of Montana,
Solicitors for Complainant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed and entered March 3d, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of March, 1904, an order granting appeal was filed herein, being as follows, to wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States for the District of Montana, Ninth Circuit.

IN EQUITY.

THE UNITED STATES OF AMERICA, Complainant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, Executrix of the Last Will and Testament of MARCUS DALY, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY, Defendants.

Order Granting Appeal.

The above-named complainant, conceiving itself aggrieved by the decree made and entered on the 26th

day of February, A. D. 1904, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit of Appeals for the Ninth Circuit.

Dated March 3d, A. D. 1904.

P. C. KNOX,
Attorney General of the United States,

M. C. BURCH,
United States Attorney,

CARL RASCH,
United States Attorney for the District of Montana,

FRED A. MAYNARD,
Special Assistant United States Attorney for the District of Montana,

Solicitors for Complainant.

The foregoing claim of appeal is allowed.

HIRAM KNOWLES,
United States District Judge for the District of Montana.

[Endorsed]: Title of Court and Cause. Order Granting Appeal. Filed and Entered March 3d, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of March, 1904, a citation was duly issued herein, being in the words and figures as follows, to wit:

Citation.

THE UNITED STATES OF AMERICA—ss.

To Margaret P. Daly, Margaret P. Daly as executrix of the Last Will and Testament of Marcus Daly, Deceased, The Anaconda Copper Mining Company, a Corporation, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, and Albert J. Campbell, Solicitor for Margaret P. Daly and Margaret P. Daly, Executrix, and W. W. Dixon, A. J. Shores, and C. F. Kelly, Solicitors and of Counsel for the Other Defendants.

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in the city of San Francisco, State of California, on the 28th day of March, A. D. 1904, pursuant to an appeal on the part of the United States filed in the clerk's office of the Circuit Court of the United States for the District of Montana, entitled The United States of America, complainant, vs. Bitter Root Development Company, a corporation, Anaconda Mining Company, a corporation, Anaconda Copper Company, a corporation, Anaconda Copper Mining Company, a corporation, Margaret P. Daly, Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, defendants,

to show cause, if any there be, why the decree of the Circuit Court of the United States in the said appeal mentioned should not be reversed and speedy justice should not be done in that behalf.

Given under my hand at the city of Butte, in the District of Montana, on the 2d day of March, A. D. 1904.

HIRAM KNOWLES,
District Judge.

Service of the above citation accepted by us this 3d day of March, A. D. 1904.

W. W. DIXON,
A. J. SHORES, and
C. F. KELLEY,

For the Anaconda Copper Mining Company, John R. Toole, W. W. Dixon, William Scallon, Daniel J. Hennessy.

A. J. CAMPBELL,

For Margaret P. Daly and Margaret P. Daly, Executrix.

[Endorsed]: No. 107. In Equity. Circuit Court of United States, 9th Circuit, Dist. of Montana. United States vs. Bitter Root Development Company, et al. Citation. Filed March 3, 1904. Geo. W. Sproule, Clerk.

Clerk's Certificate to Transcript.

United States of America,
District of Montana. } ss.

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby cer-

tify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 73 pages, numbered consecutively from 1 to 73, is a true and correct transcript of the pleadings, process, orders, decrees and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of twenty-one 10/100 dollars and has been charged to the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 8th day of March, 1904.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1047. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Bitter Root Development Company (a Corporation), Anaconda Mining Company (a Corporation), Anaconda Copper Company (a Corporation), Anaconda Copper Mining Company (a Corporation), Margaret P. Daly, Margaret P. Daly, as Executrix of the Last Will and Testament of Marcus Daly, Deceased, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed March 14, 1904.

F. D. MONCKTON,
Clerk.

NO. 207.

United States of America.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

BITTER ROOT DEVELOPMENT COMPANY, a corporation; ANACONDA MINING COMPANY, a corporation; ANACONDA COPPER COMPANY, a corporation; ANACONDA COPPER MINING COMPANY, a corporation; MARGARET P. DALY, MARGARET P. DALY as executrix of the estate of Marcus Daly, deceased; JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,

Appellees.

In Equity.

BRIEF AND ARGUMENT FOR APPELLANT.

P. C. KNOX, Attorney General,
M. C. BURCH, Special Assistant Att'y General,
CARL RASCH, U. S. District Attorney,
FRED A. MAYNARD, Special Assistant. U. S. Att'y,
Solicitors for Complainant.

NO. 207.

United States of America.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

VS.

BITTER ROOT DEVELOPMENT COMPANY, a corporation; ANACONDA MINING COMPANY, a corporation; ANACONDA COPPER COMPANY, a corporation; ANACONDA COPPER MINING COMPANY, a corporation; MARGARET P. DALY, MARGARET P. DALY as executrix of the estate of Marcus Daly, deceased; JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,

Appellees.

In Equity.

STATEMENT OF FACTS.

This case is here on an appeal from a final decree entered by the United States Circuit Court, for the District of Montana, dismissing complainant's bill of complaint. The

case was heard on general demurrers to the bill, filed by Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, the Anaconda Copper Mining Company, a corporation, and John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, defendants. No service could be had on the defendants Bitter Root Development Company, Anaconda Mining Company, and Anaconda Copper Mining Company, as they have no officers or offices and are not now in existence.

The facts of this case, as admitted by the demurrers, are substantially as follows:

On the first day of April, 1890, the complainant and appellant was the owner in fee of certain lands in the State of Montana, particularly described in the bill. These lands are situated in the Bitter Root Valley, through which the Bitter Root River and its tributaries run, and embrace a territory of about thirty miles in length, by six miles in width, and on the day and year last aforesaid, on this vast tract, there were then growing and standing forests of pine, fir and other timber fit to manufacture into lumber, for mining, commercial and all other purposes for which lumber is used. That said forests were of great value, to-wit, of the value of two million dollars; that these forests and the land upon which they were growing and standing, were the absolute property of the United States and formed a part of its public domain; that twelve years thereafter, namely, the 26th day of February, 1903, the day

on which the bill of complaint in this case was filed, said land had for the most part been stripped of said timber and, except very small portions thereof, had been so denuded without license, authority or permission of the United States, and in violation of its laws, both civil and criminal, and in consequence of said spoliation the complainant had lost millions of dollars worth of its property. The facts and circumstances attending this spoliation as set forth in the bill, and admitted by the defendants, are in substance these:

Marcus Daly, now dead, but on the first day of January, 1890, a citizen of the State of Montana, well knowing of the location of these lands, their accessibility and the great value of the timber then growing and standing thereon, did on that day and date determine that he would convert and appropriate to his own use all of the merchantable timber growing and standing thereon, without paying for said timber or obtaining any right or authority from the United States, except as hereafter stated. That in order to more effectually carry out these designs and purposes, to conceal his identity, to enrich himself individually and to better deceive the public and the local officers and agents of complainant, he determined that he would organize a corporation under the laws of the State of Montana, and for that purpose Daly called to his aid and assistance the defendants Toole, Dixon, Scallon and Hennessy and others named in the bill, and by conspiracy and confederation with them, and in consequence of such fraudulent purpose, on

the 12th day of August, 1890, they organized a corporation known as the Bitter Root Development Company, named as one of the defendants herein. Its capital stock was fixed at the sum of three hundred thousand dollars, divided into one hundred thousand shares of the par value of three dollars per share. All of said incorporators, except Daly, had but a nominal interest in this corporation, but acted as his agents, and some of them as his attorneys, and as such conspired with him as to the manner and means by which his said purpose to denude the lands of the complainant could be best carried out, and all of the shares held by them were subscribed for the use of and controlled by, said Daly.

That not only in the organization of said corporation did said defendants above named aid and assist said Daly, but in many other ways up to the time of his death, which occurred ten years thereafter, they engaged with him in the work of spoilation in pursuance of said conspiracy, and they participated with said Daly in the profits thereof, but t owhat extent is unknown to the complainant.

That at once on the organization of the said corporation said Daly, under the name of said corporation, commenced the work of cutting and carrying away from said lands the trees and timber then growing and standing thereon. In the year 1892 a large saw mill was erected at the town of Hamilton on the Bitter Root River, and the work of cutting, hauling, transporting to the river and thence to said mill, and manufacturing the same into lumber, was prosecuted with great and unremitting industry for sev-

eral years thereafter to the great profit and advantage of said Daly and his associates and to the great loss of complainant. That in pursuance of said conspiracy, and for the purpose of carrying out the same, and for the better concealing their depredations, said Daly did apply for and obtain from the complainant, licenses to cut timber upon certain small portions of the tracts of land described in the bill, and under cover of such permits they not only cut and carried away and manufactured into lumber the timber growing upon the lands included in such licenses, but also wilfully and fraudulently entered upon large tracts of land adjacent thereto, under claim that they were permitted to do so by the licenses which they had received, but in fact they at the time well knew that such licenses gave them no right or authority to enter thereon, and on such lands they cut, carried away and manufacutred into lumber the timber standing and growing thereon, and afterwards sold the same to persons and corporations to the complainant unknown, and known only to said Marcus Daly and his fellow conspirators and agents, and said Daly and his fellow conspirators appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom besides said Daly said proceeds were paid, in what proportion, in what way and at what particular time, it is impossible for the complainant to state, as all books of account, of every kind and character, were then and are now in their possession, under their control or with their assigns.

That further, in pursuance of said conspiracy and in the

execution thereof, and to more effectually conceal the same from the complainant, its officers and agents, said Daly, under the corporate name of the Bitter Root Development Company, engaged the services of a large number of men, falsely representing to them that he had the authority from the United States to cut the growing timber on said tracts of land, and made contracts with them, by the terms of which they were to be paid a certain amount for logs delivered at the river bank, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided Daly in his unlawful acts and enable him to successfully prosecute the same.

That further in pursuance of said conspiracy and in execution thereof, Daly, under the corporate name of the defendant Bitter Root Development Company, entered into other contracts or agreements with Kendall Brothers, Harper Brothers, G. L. & H. Shook, William Toole, Andrew Kennedy, D. B. Bean, John Ailport, and other persons unknown, by the terms of which they were to be paid specified prices, per thousand feet board measure, for logs delivered at the saw mill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to the United Sates and was to be unlawfully cut and removed; that said contractors, so called, acting for Daly under the name of the Bitter Root Development Company, during the year 1891, and for several years next there-

after, wilfully trespassed upon the lands named and described in the bill and cut therefrom millions of feet of logs, hauled them to the river and thence to the mill, where they were converted into lumber and sold to the public, and a large part of the proceeds appropriated by Daly and the balance by his associates in said conspiracy, but just how much and in what proportion, for the reasons above stated, it is impossible to more particularly state.

Further in execution of such conspiracy, for the purpose of concealing such illegal acts, and so complicating and confusing the situation as to make detection and proof of the same difficult, if not impossible, said Daly organized other corporations; on or about the 14th day of January, 1891, a corporation known as the Anaconda Mining Company, with a capital stock of twelve million five hundred thousand dollars was organized. In less than one year thereafter, namely, on the 5th day of December, 1891, the capital stock of said corporation was increased to twenty five million dollars. That at such last named meeting, no one of the incorporators or trustees that were named at the time of its incorporation a few months before, had any substantial interest therein, and a few days later, namely on the 31st day of December, another meeting was held at which it was voted to extend the terms of existence of said corporation for forty years from the date of its original incorporation. At that meeting it appeared that Daly, in his own person or as trustee or as a proxy, controlled over seven hundred thousand shares of the capital

stock, and in less than six months thereafter the capital stock was reduced from twenty five million dollars to one million and the shares from one million to forty thousand

In furtherance of the conspiracy aforesaid the said Daly on the 27th day of April, 1894, for and in consideration of one dollar, obtained a conveyance to himself of all of the property of said Bitter Root Development Company, and four days thereafter, namely, on the first day of May, 1894, said Daly deeded the same property to another corporation, the above named defendant Anaconda Mining Company, for the expressed consideration of $1,442,379.46 That said Daly did in fact receive the amount named in said deed, the whole thereof being directly the result of the spoilation of the lands of the complainant, and in truth and in fact belonged to complainant. All of this consideration, however, was not in cash, but a portion of the same was taken in stock in said Anaconda Mining Company, but just how much he received in cash, and how much was carried over and was taken in stock of said company, it is impossible for the complainant to precisely state.

Further in carrying out said conspiracy certain of the agents of Daly named in the bill, on the 6th day of June, 1895, organized the Anaconda Copper Company with an authorized capital stock of thirty million dollars, and nine days thereafter the same persons named as incorporators of the last named corporation, organized the defendant corporation, the Anaconda Copper Mining Company, with the same amount of capital stock, namely thirty million dollars.

Further, in execution of said conspiracy, for the purpose of still more complicating the situation, said Daly, with his agents, within one year and twenty nine days after having transferred his property to the Anaconda Mining Company, conveyed the same identical property to the defendant Anaconda Copper Mining Company for a consideration of one dollar.

The bill further charges that all of these conveyances were made, in the main, in furtherance of said conspiracy and in pursuance of the purpose to so complicate the situation as to make detection difficult if not impossible, and that Daly, during the entire ten years, namely from the organization of the Bitter Root Development Company on the 12th day of August, 1890, under the names of these several different incorporations, did carry on this work of spoliation, he continued to use the same means and the same mill at Hamilton and the officers, directors and stockholders of each of said corporations knew of this illegal work. That all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Marcus Daly and his assistants to their own use and benefit, but just how much was carried over into said corporations and how much was divided previous to the deed of conveyance to the defendant corporation, the Anaconda Copper Mining Company; how much of the timber of the complainant was converted by said last named corporation after the death of said Daly and how

much of the proceeds thereof was appropriated by Daly and his associates, and said company, it is impossible for the complainant with the means at hand, to state.

That by reason of such spoliation, continued and carried on during a period of about ten years, the complainant, the United States of America, has lost property of great value, to-wit, of the value of two million dollars. That Daly and the other defendants named in said bill, occasioned this loss by wilfully trespassing upon said lands of the complainant, and without its consent, and in violation of its laws, both civil and criminal, appropriated to their use the trees and timber growing thereon. That they had during all of this period and now have possession of the saw mill, at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them, but by reason of the frauds practised by said Daly and his assistants as aforesaid and their acts performed for the express purpose of concealing the facts of the case, by means of the formation and dissolving and reformation of corporations, and by reason of their having possession of all books of account, it is impossible to set forth to a greater extent the details of said conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when or to whom the logs, when manufactured into lumber, were sold, or just when and by whom the proceeds of the same were obtained and divided.

It further appears in the bill that at the time that these

trespasses were committed, the territory on which the same took place was but sparsely settled; was thousands of miles away from the seat of government, and it was impossible, with the means at hand, for the complainant to properly patrol and protect its domain from the wilful trespasses of the defendants, and that the government of the United States used such care in the protection of the same as it had means to do. That the agents employed by the government were mislead by the defendants' assertion of ownership and by their claim of right to cut under licenses that had been granted by the United States, and that said frauds and trespasses which have so resulted in the denuding of the lands of the United States and in the depriving it of property of the value of several million of dollars, were not discovered in their entirety until a comparatively short time ago.

It is further averred in the bill that on the discovery of said frauds the United States commenced several actions at law to recover the value of the timber so taken by the defendants and that the same were pending at the time the bill was filed, but that by reason of the frauds and conspiracy above stated, and the complications which have resulted therefrom, and for a number of other reasons hereafter stated, said action afforded the complainant no plain, adequate and complete remedy at law and the bill was filed, as the officers of the Department of Justice became satisfied that the only forum in which the United States could obtain a complete remedy was the court of

equity, where matters of this kind are properly cognizable and relievable.

It further appears in the bill of complaint that at the time of his death Mr. Daly was a citizen of the State of Montana and was a resident of the county of Deer Lodge in said state and district, and left an estate worth about twelve million dollars, consisting of real and personal property located in said county and state and elsewhere, and it is expressly charged therein that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands named in the bill and converting the timber growing thereon to his own use and benefit.

That he made and published his last will and testament wherein the defendant Margaret P. Daly is named executrix, which was admitted to probate and on the 15th day of February, 1901, letters of administration were duly issued by the proper court to her, and that she duly qualified and entered upon the discharge of her duties as executrix, and that under and by virtue of the terms of said will, said Margaret P. Daly is now the owner in her own name of a large portion of said estate.

The prayers of the bill are as follows:

First. That the defendant, Margaret P. Daly, both in her own person, and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for

the use and beenfit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

Second. That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains, and advantages which the said defendants, or either of them, have received or made or which have arisen or accrued to them, or either of them, by reason of the willful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

Third. That each of the defendants may make a full and true discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under direction and decree of this honorable court, of all the dealings and transactions between your orator and the defendants. That on such an accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon.

Fourth. That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the saw mill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits and advantages which the said defendants, or either of them, or the estate of said Marcus Daly have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

Fifth. That the said defendants and each of them discover and set forth full, true, and particular accounts of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from each and every of said sums were, respectively, received, and how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

Sixth. That the defendants, and each of them, may set forth a list of schedule and description of all books of account of every kind and character, and of all deeds, docu-

ments, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which are now, or ever were, in their or either of their possession or power, and may deposit the same with the clerk of this court, or with the standing master in chancery thereof for the purpose of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your orator may ascertain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator as aforesaid, this court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require and as may be agreeable to equity and good conscience.

The general demurrers filed in behalf of Margaret P. Daly, Margaret P. Daly as executrix of the last will and

testament of Marcus Daly, deceased, the Anaconda Copper Mining Company, a corporation, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, assign substantially the same grounds for demurrer, which can be summarized as follows:

That the bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that complainant has a full, complete and adequate remedy at law for the recovery of damages for the alleged wrongs of defendants, and also a full, complete and adequate remedy for any discovery necessary or practicable by any proceedings in such action at law.

That the complainant is not entitled to any discovery herein, as the bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States, and for that reason the defendants are not compelled to make any discovery, to answer said bill or to produce any papers, etc., relating to the matters and things stated in said bill, because to do so might subject or tend to subject them to a criminal prosecution or accusation or to a penalty or forfeiture, and for the reason that some of the defendants were attorneys, and a discovery might compel them to violate professional confidence not allowed by law to be disclosed except under certain conditions and restrictions.

and for the further reason that a discovery in this suit is not sought in aid of any action at law.

Because the bill is so general, uncertain and indefinite that it states no equitable ground for relief or discovery, and in substance it is alleged that the bill does not show the acts of the defendants by which the complainant was deceived, misled or injured.

Because the bill shows upon its face that the complainant has been guilty of laches.

Because the actions at law are not described, nor the parties thereto named, nor is it alleged that these defendant or any of them are parties to such alleged actions at law or any of them.

Because the bill admits that the defendants had licenses to cut timber from some of the lands described in the bill, but does not describe such permitted or licensed lands or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands, although knowledge of such licenses or permits was within the knowledge of complanant.

The issue presented by the filing of these general demurrers came on to be heard before the United States Circuit Court, for the District of Montana, in equity, Judge Knowles presiding, and afterwards, on the 26th day of February, 1904, the court announced that these demurrers were sustained. No opinion was filed and no reasons assigned for the ruling other than that, in its opinion, the complainant was not entitled to a discovery. A few days

later, on the 4th day of March, the complainant refusing to amend its bill, a final decree was passed, dismissing the bill of complaint, and an appeal was at once taken to this court.

ASSIGNMENTS OF ERROR.

The complainant, the United States of America, assigns as grounds of error the following:

I.

The court erred in sustaining the general demurrers to the bill of complaint.

II.

The court erred in not holding that the bill of complaint sets forth sufficient facts and circumstances to invoke the aid of equity.

III.

The court erred in entering a final decree dismissing complainant's bill of complaint.

IV.

The court erred in not overruling said general demurrers, and in not ordering the defendants to answer the complainant's bill of complaint.

V.

The court erred in not holding that the bill shows upon

its face that the complainant has no plain, adequate and complete remedy at law.

VI.

The court erred in not holding that the bill shows on its face that the only forum in which the complainant can have a full, adequate and complete remedy is in a court of equity.

VII.

The court erred in not overruling each of the following grounds of Demurrer:

That said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that the complainant has a full, complete and adequate remedy at law, by action at law, for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate and complete remedy for any discovery necessary or practicable by proceedings in such action at law.

That the complainant is not entitled to any discovery herein because:

(1). The bill shows upon its face that the complainant has a full, complete and adequate remedy at law, and is therefore not entitled to any discovery.

(2). That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore de-

fendants herein are not compelled to give any discovery herein, or to answer said bill, or to produce any papers, books, documents or accounts relating to the matters and things stated in said bill, because to do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3). The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4). The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants or any of them, are parties to, or defendants in, any action at law relating to the matters set forth in the bill.

The bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the deendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor is it sufficiently averred how

said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds from the complainant, nor the diligence with which the alleged frauds were investigated by the complainant.

The bill contains mere, loose, general and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled or injured by any of the defendants.

The bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it might be entitled, instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want whereof, in relation to the matters stated in the bill.

Said bill is uncertain and insufficient:

(1). As to the allegations of conspiracy and fraud on the part of the defendants, in that it is not shown what were the acts constituting the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant an yfacts in the case.

The allegations are general and indefinite, and do not state how the alleged frauds were perpetrated, or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how the said frauds or any acts of the defendants were concealed from the complainant.

(2). It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants or any of them are parties or defendants to such alleged actions at law or any of them.

(3). The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its

agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed land, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands as well as from other lands although knowledge of such licenses or permits was and is peculiarly within the knowledge of the complainant.

(4). Said bill is in many other respects uncertain, informal and insufficient.

ARGUMENT.

The rule is settled, that a bill is not subject to a general demurrer if it contains any matters, properly pleaded, which constitutes grounds for equitable relief or discovery, requiring an answer or plea.

It is a fundamental rule in equity pleading that if any part of the bill is good and entitled the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained.

In Pacific R. R. of Mo. vs. Missouri Pacific Ry., 111 U. S. 505-520, it is said: "The demurrers in this case are to the whole bill. If any part of the bill is good the demurrer fails. The charges of fraud in the bill, which are admitted by the demurrers, for present purposes are suf-

ficient to warrant the discovery and relief based on such charges."

Heath v. Ry. Co., 8 Blatchf. 407.
Edwards v. Bay State, etc. Co., 91 Fed. 946.
1 Daniels Chancery Practice, 605.
Wright v. Dame, 1 Met. 241.
Conant v. Warren, 6 Gray 562.
Bay State Iron Co. v. Goodall, 39 N. H. 236.
Burns v. Hobbs, 29 Me. 277.
Livingston v. Story, 9 Pet. 652-659.
Stewart v. Masterson, 131 U. S. 151-158.

The sole question, in the present situation of the case, therefore, is whether the defendants should be required to answer.

As the United States has suffered a loss of many hundreds of thousands of dollars at the hands of the defendants, it must be conceded that it is authorized to bring an action of some kind to recover for the same. The sole question is as to the form of the action.

The complainant claims that the facts and circumstances set forth in its bill of complaint show that the remedy at law is utterly inadequate, and that the only forum in which the facts and circumstances can be established and all of the necessary remedies applied, is in a court of equity.

The defendants, on the other hand, insist that the bill shows that the complainant has a full, complete and ade-

quate remedy at law for the recovery of damages for the alleged wrongs of the defendants, and that the law action is adequate for any discovery which may be required.

It seems to us that a bare reading of the bill is sufficient to convince the judicial mind that the complainant is right and the defendants are wrong, and that no review of the authorities is necessary.

The great amount involved, and the conclusion reached by us that the gigantic frauds set forth in the bill must forever remain unearthed if we cannot have the aid of equity and its processes, is our apology for the critical examination of the authorities which we have made, and which we set forth in the pages of this brief.

At the outset of this discussion we recognize the rule which holds "that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a *plain, adequate and complete remedy* without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." Our contention is that this rule has no application to the case presented by the bill now under consideration, and that the true rule applicable to it is as follows:

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the

mode of obtaining it, is as efficient as the remedy that equity would confer under the same circumstances."

Kilbourn v. Sunderland, 130 U. S. p. 514.
11 Rose's Notes, p. 753.

In Boyce's Exrs. v. Grundy, 3 Pet. 215, the Supreme Court says:

"This court has been often called upon to consider the sixteenth section of the Judicial Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate or, in other words, as practical and as efficient to the needs of justice and its prompt administration as the remedy in equity."

Payne v. Hook, 7 Wall. 430.
Oelrichs v. Spain, 15 Wall. 228.
Tyler v. Savage, 143 U. S. 95.
Pierpont v. Fowle, Fed. cases 11152.
Foster v. Swasey, Fed. cases 4984.
U. S. v. Myers, Fed. cases 15844.
Spring v. Domestic S. M. Co., 13 Fed. 449.
Gunn v. Brinkley Car, Etc. Co., 66 Fed. 384.
Society of Shakers v. Watson, 68 Fed. 738.
Nashville, Etc. Ry. v. McConnell, 82 Fed. 70.
Hayden v. Thompson, 71 Fed. 63.

Cockrill v. Cooper, 86 Fed. 14.
Alger v. Anderson, 92 Fed. 709.
See Vol. 3, Rose's Notes, pages 49, 50, 51, 52, 53.

It is also an established rule that there are a number of subjects over which courts of law and equity have a concurrent jurisdiction. Notwithstanding the provision of Section 723 of the Revised Statutes which prohibits suits in equity in any case where a plain, adequate and complete remedy may be had at law, there remains a limited range of cases in which the jurisdiction of equity continues to be exercised concurrently for the reason that the remedy at law, although existing, seems less practicable and less efficient to the ends of justice and its prompt administration than the remedy in equity.

In Root v. Ry. Co., 105 U. S. 189, Judge Matthews, in speaking for the court, in his opinion is careful to say that: "Grounds for equitable relief may arise, other than by way of injunction, where equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of and inhere in the nature of the account itself springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in the legal tribunal difficult, inadequate and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground for exception from the general rule."

The foregoing principles and authorities have been cited by us to sustain our contention that if the case presented by the bill makes out as counsel for defendants claim, simply a gigantic case of trespass in which damages are sought, that the facts and circumstances are such that the aid of equity can be invoked on the sole ground that it is the most efficient remedy, and that the action at law, by reason of its inefficiency is totally inadequate. Here we have a series of trespasses extending over a period of ten years, committed on a territory some thirty miles in length by six miles in width, on land belonging to the United States, surveyed and unsurveyed, and committed by a great number of different persons and parties, under greatly varying circumstances, and who, on the surface, appear to have no relation to the real offenders in the case. The court can readily see that a vast number of separate and distinct law suits would be required, and that when considered alone, separate and apart from the entire transaction, it would be simply impossible for the government to make the necessary proof.

Judge Sanborn in Hayden v. Thompson, 71 Fed. 63, in speaking for the Circuit Court of Appeals for the Eighth Circuit, says: "Would these actions at law be as efficient, as practical and as prompt to attain the ends of justice as this suit in equity? The question is its own answer. * * * * The recovery of this fund by actions at law might, and probably would, involve taking each of these accounts of the assets and liabilities of

this bank as many times and before as many juries as there are shareholders in these accounts respectively. When it is considered how difficult it is for a judge and jury in a trial according to the strict rules of the common law, where the evidence must be presented to twelve men, who must hastily agree upon their verdict before they separate, to correctly take and state an account which contains numerous items, that for this reason the taking of mutual accounts has become an acknowledged ground of equity jurisdiction, (Gunn v. Manufacturing Co., 13 C. C. A., 529; 66 Fed. 382; Kirby v. Railroad Co., 120 U. S., 130, 134; 7 Sup. Ct. 430) and that the trial of the claims of this complainant in separate actions at law against these several shareholders involves the taking of so many accounts by so many juries, the conclusion is irresistible that the complainant's remedy at law is not only inadequate and inefficient to reach the ends of justice, but that it is impracticable and useless for that purpose. These long and complicated accounts can be properly taken and stated, and the just deductions can be drawn from them only in a court in which a careful, patient and extended examination of all the evidence can be made after it is submitted, by a mind trained in the science of accounting and familiar with the law which governs it."

Wyman v. Bowman, 127 Fed. p. 263.

IT IS, HOWEVER UNNECESSARY for us to rest our

claim that equity has jurisdiction on this narrow foundation.

There are many separate and distinct grounds upon which its aid can be invoked, which we shall now proceed to name in their order.

In Kennedy v. Creswell, 101 U. S., 641-645, Mr. Justice Bradley, in speaking for the court, says:

> "The point taken by the appellant that the court below sitting as a court of equity had no jurisdiction of the case, is not well taken. The authorities are abundant and well settled tha ta creditor of a deceased person has a right to go into a court of equity for a discovery of asse'ts and the payment of his debt. When there he will not be turned back to a court of law to establish the validity of his claim. The court being in rightful possession of the case for a discovery and account, will proceed to a final decree upon all the merits.
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> Thompson v. Brown, 4 Johns (N. Y.) Ch. 619.
> 1 Story Eq. Jur. Sect. 546.
> 2 Williams Exrs. 1718, 1719.

The allegations of the bill in this case were sufficient to give the court jurisdiction and the accounts of the executor show that the complainant had reasonable cause for making those allegations. They went into the court for a discovery of assets and the object of the bill was attained by the admission of the executor that he had suf-

ficient assets. It would be strange, indeed, if that admission could be made a ground for depriving the court of its jurisdiction. If it could, the discovery, by proof of assets concealed by the executor, would have the same effect, and the result would be that a bill in equity could be defeated by proofs showing that there was good ground for filing it."

In Green's Admx. v. Creighton et al., 23 Howard 90, Mr. Justice Campbell, in delivering the opinion of the court at page 106, says :

> "The questions presented for inquiry in this suit are whether the subject of this suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control over it. The court has jurisdiction of the parties. In the court of chancery, executors and administrators are considered as trustees and that court exercises original control over them in favor of creditors, legatees and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity and obtained a decree for payment out of the personal estate without taking a general account of the testator's debts. (Attorney General v. Cornthwaite, 2 Cox 43; Adams Equity 257), and the existence of this jurisdiction has been acknowledged in this court and in several of the courts of chancery in the states."

Hagan v. Walker, 14 How. 29.

Pharis v. Leachman, 20 Ala. R. 663.

Spottswood v. Dandridge, 4 Munf. 289.

At page 108 this great Justice says:

"The duty of the administrator arises to pay the debts when their existence is discovered and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond, arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits and its power to adapt its decree to the substantial justice of the case."

See also Payne v. Hook, 7 Wall. 425.

Byers v. McAuley, 149 U. S. 608.

Fowle v. Lawrison's Exrs. 5 Pet. 495.

Hale v. Tyler, 115 Fed. 833.

Mr. Pomeroy, in his work on Equity Jurisprudence, Vol. 1, Section 156, says:

"One of the most important subjects to which the theory of trust has been extended is the administration of estates of deceased persons. The relation subsisting between executors and administrators on the one hand, and legatees, distributees and creditors on the other, has so many of the features and incidents of an expressed, active trust that it has been completely embraced within the equitable jurisdiction in England and also in the United States."

And then he goes on to say, what is obviously true,

namely, that at common law, although individual creditors might recover judgment of their respective demands, the legal procedure furnishes absolutely no means by which the rights and claims of all the parties in interest could be ascertained and ratably adjusted, the assets proportionably distributed and the estate finally settled, thus making a resort to a court of equity necessary for a proper administration of the assets.

In Beverly v. Rhodes, 86 Va. 416, it is said:

> "The first and principal question arises upon the demurrer to the bill. The appellant insists that the complainant's remedy was at law and that a court of equity has no jurisdiction of the case, but we do not concur in this view. That a single creditor at large of a deceased debtor may sue the personal representative in equity for an account of assets and the payment of his debt, is well settled.
>
> "The decree for account, however, whether the suit be brought for the plaintiff singly or on behalf of himself and other creditors (for it makes no difference) is for the benefit of all the creditors, and hence all may come in and prove their debt before the master, and have satisfaction of their demands equally with the plaintiff in the estate, for all are as parties. In this way a multiplicity of suits is avoided, the assets are marshalled and complete relief afforded. The jurisdiction of a court of equity in such cases is said by some of the authorities to be

> founded upon the necessity of taking accounts or compelling a discovery of assets, and because there is no adequate remedy at la.w By others, it is put upon the ground of a trust in the personal representative which it is the duty of the court of equity to enforce, but whatever may be the reason the jurisdiction is not only well established, but with us is practically exclusive."

We have now established, we think, that there are two grounds upon which we have the right to invoke the aid of equity in this case. First, because it is the more efficient remedy, and an action at law would be utterly inadequate; and Second, by reason of the original jurisdiction which courts of chancery have over executors and administrators, who are cors'dered as trustees in favor of creditors, in reference to the proper execution of their trust.

The Third ground upon which we have the right to invoke the aid of equity is this: The bill shows that an accounting is necessary in order to ascertain just when and by whom the proceeds arising from the denuding of the complainant's forests by the defendants were received, and ascertain how much of the same is now in the possession of the Daly estate, how much appears in the Anaconda Copper Mining Company, and how much the individual defendants received. The governing rule may be stated as follows:

> "Equity has jurisdiction in settlement of accounts

where the dealings between the parties were numerous and the matters in dispute are so many that it is impracticable to take an account by the ordinary common law proceedings."

Mr. Chief Justice Marshall, in Fowle v. Lawrison's Exrs., 5 Pet., 495-503, says:

"In all cases in which an action for account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted."

In Fenno et al. v. Primrose et al., 116 Fed. 49 (1902), Judge Putnam, in deciding that equity has jurisdiction of a suit by a factor for a settlement of his account with his principal, where the dealings between the parties were numerous and the matters in dispute are so many that it is impracticable to take an account by the ordinary common law proceedings, says:

"If the questions are so involved as would appear in the declaration in the suit at law and in the allegations of complainant's bill, we have no question that an attempt by a jury to pass on the issues between the parties would result in a failure of justice, because it would be impracticable for a jury to do so correctly. The most that a jury could award would be a lump sum, derived from the general impressions remaining as a consequence of a trial covering, as this would, several weeks, and involving a

great multitude of items of all kinds. * * * Consequently, as the case now stands, it is impossible to do justice except on an accounting taken under the direction of a chancellor. Under such circumstances we think jurisdiction lies in equity. Mr. Justice Story, in Section 459 of his work on Equity Jurisprudence, apparently leaves one side a case like this at bar, and enumerates only certain well known grounds of jurisdiction in equity for taking accounts. Of course there is no doubt that, wherever the technical action of account lies at comon law, equity has concurrent jurisdiction. So, also, it has undoubtedly jurisdiction to take the accounts of a principal against an agent, a cestui que trust against a trustee, a consignor of goods against his factor, and in all cases where there is a fiduciary relation which entitiled the complainant in the bill to demand an account and a discovery of the items thereof. So, also, it is universally recognized *that equity has jurisdiction where there are mutual accounts of a complicated character. The case at bar, however, is not within those clear equities, as it is not by a principal against an agent, but by an agent against his principal; and the only ground on which jurisdiction is asserted is the complicated nature of the accounts, rendering it, as we have shown, impracticable to take them by the ordinary common law proceedings. In Mr. Bigelow's note to the section in Story's Equity Jurisprudence to which we have referred, he states

three grounds of equity jurisdiction, among which is where dealings are so complicated that they cannot be properly adjusted in a court of law. That under such circumstances the chancellor has jurisdiction is apparently thoroughly settled in England, and, as is well known, the federal courts act on the rules and principles which have long been recognized by the English equity courts, notwithstanding the general enactment in the statutes of the United States barring the exercise of equitable jurisdiction where there is an ample remedy at law. * * * The rule is laid down by Lord Redsdale in O'Connor v. Spaight, 1 Schoales & L. 305, 309, decided as early as 1804, to the effect that it is a sufficient ground for jurisdiction in equity that the accounts are too complicated to be taken at law. Also in Foley v. Hill, 2 H. L. Cas. 28, the rule is clearly recognized that the chancery courts will take accounts when complicated, independently of all other equities; and the cases, including the three which we have cited, were summed up to that effect by the court of appeal in Hill v. Railway Co., 12 Law. T. (N. S.) 63, in a case in which fundamental issues, aside from those of a mere accounting, were raised in litigation on a bill brought by a contractor against a railway company for the adjustment of liabilities growing out of a construction contract.

"In the United States the rule was sufficiently

stated by Mr. Chief Justice Marshall in Fowle v. Lawrison's Exr., 5 Pet. 495, 503, 8 L. Ed. 204, 207, as follows:

"'In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal; but in transactions not of this peculiar character great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction.'

"There is nothing in Root v. Railroad Co. 105 U. S. 189, 26 L. Ed. 975, which contravenes the rule thus recognized by the authorities to which we have referred."

In Kirby v. Lake Shore Ry., 120 U. S. 130, 134, Mr. Justice Harlan, in delivering the opinion of the court, says:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled

on each settlement. 1 Story Eq. Juris. Sec. 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot be doubted."

Says Mr. Justice Story, in Jones v. Lockhart, 2 Story Rep., p. 248:

"It is certainly true that in matters of account, courts of equity possess a concurrent jurisdiction in most, if not in all, cases with courts of law. In the present case, taking the statements of the bill to be true, which we must upon demurrer, it seems to us not only clear that it is a case fit for the interposition of a court of equity, but that it is emphatically so, and as one where a court of law could not render any justice in the matter, or, if any, it must be a very crippled and improper redress. It is indeed impossible to read the bill and not feel that some of the claims there set up, considering the complications and changes of interest of the parties, cannot be adequately examined, or properly disposed of, except in a court of equity."

The bill in this case discloses that *mutual accounts* are involved, for it is admitted that during the years when it is claimed that these trespasses were committed by the

defendants, that they did obtain from the government licenses and permits to cut timber on certain small portions or tracts mentioned in the bill, and that under cover of such permits and licenses, they not only cut and converted trees into lumber from lands included in such permits, but well knowing that such permits gave them no license or authority to enter upon other lands of your orator, they wilfully and fraudulently entered upon large tracts of land adjacent thereto, and cut, carried away and converted trees and timber thereon, and afterwards sold the lumber to persons and corporations to your orator unknown, and known only to the said defendants, and appropriated the proceeds thereof to their own use.

These permits are now in the possession of the defendants, or under their control. It is safe to assume that their books of account will show just how much timber was cut from lands covered by these permits or licenses, to whom the logs when manufactured into lumber were sold, and how much was obtained for the same, all of which information is exclusively in the possession of the defendants. If, on the production of the accounts and a thorough probing of the same before the master, it shall be found that the terms of the licenses and the conditions on which they were granted were fully complied with, the complainant will cheerfully credit the defendants with the same, and of course withdraw from its claim all tracts so covered by said licenses. But the burden of prov-

ing that the logs were taken and used in accordance with said licenses is upon the defendants.

> Northern Pacific R. R. Co. v. Lewis, 162 U. S. 366.
> U. S. v. Denver & R. G. R. R., 191 U. S. 84.

Even if this were not a case of *mutual* accounts, it is the settled law that a suit in equity for an accounting is proper, though the accounts are all on *one side*, if there are circumstances of great complication or difficulty in the way of adequate relief at law.

In Society of Shakers v. Watson, 37 U. S. App. 141, 15 C. C. A. 632, 68 Fed. 730, the court, in speaking of the jurisdiction of the courts of equity, where no adequate remedy at law exists, say:

> "A large branch of equity jurisdiction has always been concurrent with that of courts of law,—that is, has extended over the same general subjects as those taken cognizance of in actions at law; but where, from the nature of the circumstances, and on account of the inadequacies of its remedies, a court of law cannot afford the due and appropriate relief. In these cases there is an obligation of a legal character at the foundation of the suit, like the note in the present case, but there is some difficulty in the manner in which the obligation rests upon persons or property, or in the efficiency of the process belong-

ing to the court which makes the legal remedy inadequate."

Boyce's Exrs. v. Grundy, 3 Pet. 210.
Wylie v. Cox, 15 How. 416.
Barber v. Barber, 21 How. 582.

In Weymouth v. Boyer, 1 Ves. Jr. 424, Mr. Justice Buller, sitting for the Lord Chancellor, says:

"We have the authority of Lord Hardwicke that if a case was doubtful, or the remedy at law difficult, we would not pronounce against the equity jurisdiction. This same principle has been laid down by Lord Bathurst.

"It would result from these considerations that this bill could be maintained if the note could be regarded as imposing a technically legal liability."

In Seymour v. Dock Company, 20 N. J. Eq. p. 396, the court says:

"The whole machinery of courts of equity is better adapted for the purpose of an account than any of the courts of common law, and in many cases, as has been said, when accounts are complicated, it would be impossible for courts of law to do entire justice between the parties. Courts of equity, in cases of complex accounts, take cognizance sometimes from the very necessity of the case, and through the incompetency of the courts of law at *nisi prius*, to examine it with the necessary accuracy.

On this ground alone, I think, the jurisdiction of the case must be maintained."

"A suit in equity for an accounting is proper where all the accounts are on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law."

Pomeroy, Eq. Jur., Vol. 3, 2nd Ed., Section 1421.
Blodgett v. Foster, 114 Mich., 688.

In appeal of Brush Electric Co., 114 Pa. St. at p. 574, the court makes use of the following language:

"Equity jurisdiction does not depend on the want of a common law remedy; for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties; hence, the exercise of chancery powers must often depend on the sound discretion of the court. So, a bill may be maintained solely on the ground that it is the most convenient remedy."

The same court, in Johnston v. Price, 172 Pa. St. 427, says:

"It is almost a work of supererogation to cite the perfectly familiar authorities, that in order to oust the equitable jurisdiction, the remedy, or supposed remedy at law must be full, adequate and complete, or that equitable jurisdiction does not depend on the want of a common law remedy, but may be sustained

on the ground that it is the most convenient remedy."

See also Mitchell v. Mfg. Co., 2 Story 648.

Tyler v. Savage, 143 U. S. 95.

Jones v. Bolles, 9 Wall. 364-369.

Russell v. Clark's Exrs., 7 Cranch, 69-89.

Ludlow v. Simon, 2 Caine's Cases in Equity, p. 38.

In Gunn v.Brinkley Car Works and Mfg. Co., 66 Fed. 382, it was held that where G. as surviving partner of the firm of G. & B. filed a bill for an accounting against the B. Manufacturing Co., and it appeared that the transactions between the firm and the B. Mfg. Co. involved a running account of more than 500 items, extending over more than six years, and further complicated by fraudulent entries and omissions by the deceased partner of the firm, who had been its manager, and also the manager of the B. Mfg. Co., it was held that an action at law for the balance due in a federal court, the federal court having no power to order a reference, would be an inadequate remedy, and that the case was within the jurisdiction of a court of equity. Judge Sanborn, in deciding the case for the Circuit Court of Appeals for the Eighth Circuit, says:

"But how can the appellant in this case obtain a correct and adequate accounting between this partnership and corporation in an action at law? In such an action for the balance due this account, the national courts have no power to order a reference to take and state the account, but the entire case must be tried to the jury. According to this bill, there is here a mu-

tual running account that extends over a period of more than six years; it involves more than five hundred items; it has been complicated and confused by the fraudulent entries and omissions of a faithless trustee; and, in our opinion, it would be next to impossible for a jury to carefully examine this account and reach a just result. That can only be done by a reference to a master or a hearing before a Chancellor in the method peculiar to a court of equity. In Kirby v. Railroad Co., 120 U. S. 130, 134, 7 Sup. Ct. 430, a case involving an account aggregating about $350,000, and running for a period less than ten months, Mr. Justice Harlan, in delivering the opinion of the Supreme Court, said (Judge Sanborn then quotes from the opinion of the court in that case, the paragraph we have herein set forth, and continues his opinion as follows:)

"To deprive a court of equity of jurisdiction, the remedy at law must be plain and adequate,—'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce's Ex'rs. v. Grundy, 3 Pet. 210, 215; Oelrichs v. Spain, 15 Wall., 211, 228; Preteca v. Land Grant Co. 4, U. S. App. 327, 330, 1 C. C. A. 607; 50 Fed. 674; Flotz v. Railway Company, 8 C. C. A. 635, 641; 60 Fed. 316, 322. An action at law in a federal court does not furnish such an adequate and efficient remedy for the

examination of a long, confused and complicated mutual account like that disclosed in this bill."

Judge Taft, sitting with Mr. Justice Harlan and Judge Lurton, in the Circuit Court of Appeals, Sixth Circuit, in the case of Bank of Kentucky v. Stone, 88 Fed. page 391, says:

> "The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity on the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. And the application of the rule depends upon the circumstances of each case.' Boyce v. Grundy, 3 Pet. 210, 215; Sullivan v. Railroad Co., 94 U. S. 806. Watson v. Sutherland, 5 Wall. 79."

Practically the same language is used by Judge Bunn, in deciding the case of U. S. Life Ins. Co. v. Cable, 98 Fed. 761, sitting with Judge Woods, Circuit Judge and District Judge Allen, in the Circuit Court of Appeals of the Seventh Circuit.

It was said by Lord Eldon in Eyre v. Everett, 2 Russ. 381:

> "This court will not allow itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction."

The Fourth ground on which we are warranted in invoking the aid of equity is the avoidance of a multiplicity of suits. The bill shows that the acts committed by the defendants were not simply fugitive and temporary trespasses for which adequate compensation could be obtained in an action of law and the machinery of the law courts sufficient to reach all of the facts in the case, but their acts consisted in a destruction of the corpus of the estate, as almost the sole value of the lands described in the complaint was the value of the timber growing and standing thereon. Acts of destructive waste continued over a period of ten years, and under such complication of circumstances that no jury, in a law court, could possibly, with the means at hand, investigate the same so as to insure a correct result.

The bill shows that a vast number of actions at law would have to be commenced and tried before anything like the subject matter of this litigation could be covered. The persons who actually did the cutting are not the same, and the facts and circumstances surrounding the cutting by the several contractors, under whose supervision the cutting was actually done in the interest of the defendants, were entirely different, so that each suit would be separate and distinct, but there would be enough similarity in the facts and circumstances to prevent the jury in one case acting in the other; consequently the cases would have to be continued over the terms and the diffi-

culties would prove so great that the prosecution would have to be abandoned.

Under these circumstances, adopting the language used by Judge Severens in delivering the opinion of the court of appeals for the Sixth Circuit in Bailey v. Tillinghast, 99 Fed 801:

> "It is not necessary to rest the equitable jurisdiction over the case upon the fact that the receiver, as the representative of the creditors, is seeking to recover a trust fund, and that there is a complication of interest in the questions and matters involved, for we are clearly of the opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits, and for this latter purpose it is immaterial whether the suits to be avoided or proven are of a legal or an equitable character. The object is the same in either case, and the reason for the proceedings is the same."

In short, we have here practically the same situation as that presented in DeForrest v. Thompson, 40 Fed. 375. In that case Judge Jackson, in delivering the opinion of the court, in which Mr. Justice Harlan concurred, at page 378, said:

> "It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants and succeeded, the judgment would not conclude the

other defendants altogether; the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands * * may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing in equity and bringing all of the defendants before the court in one action, they can avoid a multiplicity of suits? I think they can.

1 Pom. Eq. Jur., Sections 245-269.
See also Garrison v. Ins. Co., 19 How. 312.
Story's Eq. Jur., Section 928.
West Point Iron Co., v. Reimert, 45 N. Y. 703.
Preteca v. Land Grant Co., 50 Fed. 676.

We have then in this case as ingredients to support the jurisdiction of equity the following:

1st. It is the most efficient remedy and no full, complete and adequate remedy is given by law.

2nd. The authority of equity over Mrs. Daly as an executrix.

3rd. The necessity of an accounting.

4th. The prevention of a multiplicity of suits.

We have also discovery, fraud, misrepresentation, waste and concealment, which we shall now proceed to treat briefly in their order.

Another ground upon which we invoke the aid of equity

is the absolute necessity of discovery. The bill in this case is filed for final relief, and to that end discovery from the defendants is necessary.

Counsel for the defendants, in the main, ignore this fact, and prepared their demurrers to the bill on the notion that it was a "bill for discovery," in the sense that its object was solely to obtain the evidence of the parties for use in the trial of legal actions.

If the bill of complaint states a cause for equitable relief, all the points raised by the defendants in their general demurrers relative to the discovery features thereof should be disregarded, for the rule is settled, if a bill for relief and discovery contains proper matter for the one and not for the other, the defendants should answer the proper and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled. Stated in another way, the rule is as follows: Where the bill is filed for the purpose of obtaining final relief, and where discovery is only incidental to that end, there can be no demurrer to the discovery only, *for the simple reason that if the discovery be material in support of the relief, and the complainant be entitled to the relief, the defendants must answer.* Therefore, reference to rules of law relative to discovery are unnecessary, and we would refrain from such reference were it not for th fact that the court below sustained these demurrers and dismissed the bill on the sole ground that discovery would not lie. We therefore cite a few authorities simply to show how thoroughly established

the rule is that where a bill is filed for relief, a discovery may be required of the defendant as an incident thereto.

In this case, as in Tyler v. Savage, 143 U. S. 95, a recovery by the complainant depends largely on the information in the possession of the defendants, and which is sought by the bill, and therefore, in this case, as in that, discovery is one of the grounds for invoking the jurisdiction of equity.

Mr. Justice Story, in his work on Equity Jurisprudence at Section 67, says:

> "In cases of account, there seems to be a distinct ground upon which the jurisdiction of discovery should incidentally carry the jurisdiction for relief. In the first place, the remedy at law, in mose cases of this sort, is imperfect or inadequate. In the next place, where this objection does not occur, the discovery sought must then be obtained through the instrumentality of a master, or of some interlocutory order of the court, in which case it would seem strange that the court should grant some, and not proceed to full, relief. In the next place, in cases not falling under either of these predicaments, the compelling of the production of vouchers and documents would seem to belong to a court of equity, and to be a species of relief. And in the last place, where neither of the foregoing principles applies, there is great force in the ground of suppressing a multiplicity of suits, constituting as it does, a peculiar ground for the interference of equity."

The waiver by plaintiff in his bill, under equity rule No. 41, of an answer on oath, is not a waiver of his right to a full answer and for discovery from the defendant.

A bill for relief in a court of equity is, in fact, a bill for discovery, because it asks, or may ask, from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a court of chancery and the right of the plaintiff to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right or title or apply an equitable remedy.

Bates Fed. Eq. Procedure, pp. 128-130.

See also Uhlmann v. Arnholt etc. Co., 41 Fed. 369,

Gamewell Fire Alarm Tel. Co., v. The Mayor, etc., 31 Fed. 312.

Colgate v. Campagnie, 23 Fed. 82.

Reed v. Cumberland, 36 N. J. Eq. 393.

Patterson v. Gaines, 6 How. 588.

Union Bank v. Gary, 5 Pet. 99.

Kittridge v. Claremount Bank, 1 Woodb. & M. 244; F. C. 7859.

Bartlett v. Gale, 4 Paige, 503.

In Kelley v. Boettcher, 85 Fed. 66, Judge Sanborn, in delivering the opinion of the court, says:

"A single question remains, and that must be answered in the affirmative. It is: Are the appellants entitled to a discovery, in aid of their title and suit,

of the facts within the knowledge of the appellees? It is true that the right to a discovery in courts of equity arose from the necessity of searching the conscience of the opposing party in order to ascertain facts, and obtain documents within his knowledge and control. It is true that the federal and state statutes now in force, which enable the complainant to obtain such an examination, have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of courts of equity to enforce them. They have only added another right to that which had already been secured in courts of chancery. Story Eq. Pl. sec. 311; Bisp. Eq. p. 15, Sec. 557; Pom. Eq. Jurisp. Sec. 201; Equity rules 40-44."

See also Lovell v. Galloway, 17 Beav. 1.

British Empire Shipping Co., v. Somes, 3 Kay & J. 433.

Shotwell's Exr. v. Smith, 20 N. J. Ch. 79.

Cannot v. McNabb, 49 Ala. 99.

Millsaps v. Pfeiffer, 44 Miss. 805.

But it is said by the defendants in their demurrer, that a discovery should not be granted, because true answers to the bill might subject them to a criminal prosecution or accusation or to a penalty of forfeiture. The answer to this objection is this: Mr. Daly is dead, and no charges are made against his executrix, Margaret P. Daly, which would subject her to criminal prosecution or accusation or to a

penalty or forfeiture. As to the defendant corporation, the Anaconda Copper Mining Company, it is settled that it is the duty of a corporation, if required to do so by the bill, to put in a full, true and complete answer, and to enable it to do so it must cause diligent examination to be made of all its papers and muniments in its possession, before answering.

To the point that since all the officers of a corporation are made competent witnesses by the federal statutes, there is no longer any reason for allowing a bill for discovery against a corporation. We answer: The corporation, as such, cannot be sworn and examined as a witness, and it is apparent that a discovery from this corporation is essential to attain the ends of justice. It possesses facts essential to a recovery, which complainant does not possess and cannot acquire except by obtaining a discovery through the answer of the corporation. The examination of its officers as witnesses can in no event be the exact equivalent of a discovery by the corporation itself through an answer made under its corporate seal.

See Bank v. Heilmen, 66 Fed. 184.
Pom. Eq. Jur. Section 199.
Evans v. Lancaster, 64 Fed. 626.
McClaskey v. Barr, 40 Fed. 559.

While in the words of Mr. Pomeroy "it is true that the defendant is never compelled to disclose facts which would

tend to incriminate himself, or to expose him to criminal punishment or prosecution or to pains and penalties, fines or forfeitures," this restriction to the right of discovery is subject to special limitations and exceptions necessary in order to promote the ends of justice.

The first exception to the rule is this: "A defendant is always compelled to disclose his frauds and fraudulent practices when such evidence is material to the plaintiff's case, even though the frauds might be sogreat as to expose the defendant to a prosecution for conspiracy, unless, perhaps, the indictment were actually pending."

Second, "where the liability to a penalty is barred by lapse of time, the defendant cannot escapt making a discovery."

Pom. Eq. Jur. Section 202.
Trinity House Corp. v. Burge, 2 Sim. 411.
Mitford on Eq. Pl. 195-197.
Divinal v. Smith, 25 Me. 379.
Skinner v. Judson, 8 Conn. 528.

The complete answer to the point raised that some of the defendants who aided Daly are his attorneys and therefore they are not compelled to answer under the discovery demanded, is this:

"An attorney, by reason of his professional relation, cannot refuse to make a discovery of the facts within his knowledge where it is unlawful for the client to ask and the solicitor to give, professional advice, and therefore

communications by which fraud is contrived or arranged betewen a lawyer and a client, are wholly excluded from the privilege and must be divulged."

Pom. Eq. Jur. Section 203.
See Peck v. Ashley, 12 Met. 482.

Where a penalty of forfeiture has at one time attached to the particular act of which a discovery is sought, and the penalty or forfeiture either by lapse of time or the death of the party or against whom it may be enforced or otherwise, the objection to the discovery is thereby removed, and the bill is no longer demurrable. Thus, for example, if the statute of limitation for a penalty or forfeiture has expired before the suit was brought, or pending the suit before the discovery is given, the defendant is bound to answer, for he is no longer within the reach of the perils against which the protection is allowed.

Story Eq. Pl. Section 598.
Corporation of Trinity House v. Burge, 2 Sim. 411.
Williams v. Farrington, 3 Bro. Ch. R., 38; Anon. 1, Vern. 60.

We are further authorized to invoke the aid of equity in this case by reason of the fraud, misrepresentation, and concealment practised by the defendants.

In Jones v. Bolles, 9 Wall. 364, it is laid down that equity has always jurisdiction of fraud, misrepresentation and concealment, and does not depend on discovery.

Mr. Justice Bradley, speaking for the court, said:

> "It is objected that a court of equity has no jurisdiction of the case, because the law affords a complete remedy in damages. The objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against the parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity."

The defendants say, in paragraph three of their demurrer, that the bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers were misled by any of the alleged acts of defendants, or how such acts complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; that it is not sufficiently averred how said frauds were perpetrated or how the alleged acts of fraud were committed; nor why the alleged frauds were not sooner discovered by complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds from complainant; nor the diligence

with which the alleged frauds were investigated by complainant.

Also that the bill contains mere loose, general and indefinite allegations of fraud, and does not show the acts of defendants by which the complainant alleges that it was deceived, misled or injured by any acts of the defendants.

In answer to this objection we say: The facts of the case are set forth as fully as we are able to do so. Had the concealment alleged in the bill and the complications, gotten up for the express purpose of preventing knowledge, not been so great we would of course have more exact knowledge of the details of this fraud and could have stated them fully in the bill, but the objection of the defendants now under consideration is not good in law, as the rule is this:

"While every material fact to which plaintiff means to offer evidence, ought to be distinctly stated, a general statement of the matter is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence which need not be charged in order to put them in as proofs."

Story Eq. Pl. Section 28.
1 Daniel Ch. Pr. Star P. 380.
Fletcher Eq. Pr. Section 106.
Chicot v. LeQuesne, 2 Ves. 318.
Clark v. Petriam, 2 Atk. 337.
Lloyd v. Brewster, 4 Paige 537.

In Dunham v. Eaton, 1 Bonds Reports 492, Fed. Cases 4150, the court say:

"The enforcement of the rigid rule of pleading, insisted on in support of this demurrer, would leave the complainants wholly without remedy, and altogether defeat the purpose of their bill. The very prayer of the bill is, that they may have a discovery from the defendants concerning the matters in regard to which the alleged uncertainty exists. If the allegations of the complainant's are true, they do not know, and have not the means of ascertaining these matters, except by a discovery from the defendants, it is very clear that they are without remedy, unless they can call on them for a discovery as prayed for in the supplemental bill. The facts about which they are required to answer are within their knowledge, and they cannot be taken by surprise in being called upon to answer. They certainly know whether they subscribed stock for the purpose alleged, to which company it was subscribed, how much of it was paid, and what is now due. And I am at a loss to perceive the hardship of requiring them to disclose these facts by their answers. If they, or any of them, are not indebted it is a good defense to the claim asserted against them; and if there is a just indebtedness on account of their subscription, the complainants have an equitable claim for it. True, the defendants, if they prefer that course, may decline to answer, and allow a decree pro

> confesso to pass against them. In that event, the court, on application, would direct the master to take and report a statement of the indebtedness of each of the defendants. And, if it should be necessary for this purpose, that the master should examine them touching their indebtedness, one of the rules of chancery practice of this court confers ample authority to do so. The 77th rule is referred to, which provides, among other things, in case of reference to a master, that 'he shall have full authority to examine the parties to the case touching all matters contained in the reference, and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto.'"

The same strictness is not required in a bill of equity as in a declaration of common law, but it may perhaps be correctly affirmed that certainty to a common intent is the most that the rules of equity ordinarily require in pleadings for any purpose. Even in criminal pleading, where the highest degree of certainty is required, it is not necessary to state the particular means employed to effect the unlawful acts.

In Coffin v. U. S. 156 U. S. 448, Mr. Justice White, in speaking for the court on this subject, said:

> "Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in United States v. Simmons, 96

U. S. 360, 363, as follows: 'Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement.' It is laid down as a general rule that 'in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commision of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. 2 Wharton 1281; United States v. Gooding, 12 Wheat. 460."

How can counsel insist, as they do in their demurrers, that the bill does not show how the acts of the defendants were fraudulent, or how the complainant was injured, when they admit (as distinctly alleged in the bill) that $1,700,000 worth of complainant's timber was unlawfully taken by them and converted to their own use?

Laches: But a single word is necessary relative to this point raised by the defendants in their demurrers. There has been no laches by the government in the prosecution of this case. If there had been, the defense of laches cannot be set up against the government in actions brought to recover for the conversion of its property.

U. S. v. Dallas Military Road Co., 140 U. S., p. 632.

San Pedro &c. Co. v. U. S., 146 U. S. 120.

U. S. v. Bell Tel. Co., 167 U. S. 264.

U. S. v. Nashville &c. Ry. Co., 118 Fed. 125 (Opinion by Mr. Justice Gray.)

For reasons assigned, we ask that the decree of the Court below be reversed, with direction that defendants answer the bill of complaint.

Respectfully,

P. C. KNOX, Attorney General,
M. C. BURCH, Special Assistant Att'y General,
CARL RASCH, U. S. District Attorney,
FRED A. MAYNARD, Special Assistant. U. S. Att'y,

Solicitors for Complainant.

No. 1047

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
BITTER ROOT DEVELOPMENT COMPANY (a corporation), ANACONDA MINING COMPANY (a corporation), ANACONDA COPPER COMPANY (a corporation), ANACONDA COPPER MINING COMPANY (a corporation), MARGARET P. DALY, MARGARET P. DALY, as executrix of the estate of Marcus Daly, deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON and DANIEL J. HENNESSY,
Appellees.

In Equity

BRIEF AND ARGUMENT FOR APPELLEES.

W. W. DIXON, A. J. CAMPBELL, A. J. SHORES, C. F. KELLEY, JOHN F. FORBIS and L. O. EVANS,
of Butte, Montana, Solicitors and of Counsel for Appellees.

INTER MOUNTAIN, PRINTERS, BUTTE

IN THE

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FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
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vs.

BITTER ROOT DEVELOPMENT COMPANY (a corporation), ANACONDA MINING COMPANY (a corporation), ANACONDA COPPER COMPANY (a corporation), ANACONDA COPPER MINING COMPANY (a corporation), MARGARET P. DALY, MARGARET P. DALY, as executrix of the estate of Marcus Daly, deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON and DANIEL J. HENNESSY,
Appellees.

} In Equity

BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT.

This is an appeal from the action of the lower court sustaining the demurrers of appellees to complainants' bill of complaint and dismissing the cause. Separate demurrers were filed and presented—one by the Anaconda Copper

Mining Company, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy; and another by Margaret P. Daly, and Margaret P. Daly, as executrix of the Last Will and Testament of Marcus Daly, deceased. The questions raised by the two demurrers are so similar that, for convenience, we will present them together in this brief.

In appellant's brief it is stated that the Bitter Root Development Company, Anaconda Mining Company and Anaconda Copper Mining Company, which had not been served, and did not appear in the action, have no offices or officers, and are not now in existence. This statement is an error in fact and upon the record in this case. The Anaconda Copper Mining Company has appeared and filed its demurrer in the action. The record shows (page 40 of Transcript) that the Bitter Root Development Company, and the Anaconda Mining Company and the Anaconda Copper Company, could not be found in the District of Montana; but there is no allegation in the bill, or showing beyond this, and nothing to justify the statement that any of these corporations have no officer or officers, or have been dissolved.

Briefly, the facts in the bill of complaint of complainant in this case are as follows: It is alleged that at various times since the year 1888 one Marcus Daly, directly and through the vari-

ous corporations and other persons named in the bill, and the other defendants there named, excepting Margaret P. Daly, wilfully trespassed upon various lands belonging to complainant, and took and converted large quantities of logs which were manufactured into timber and lumber of various kinds, of a value in excess of two million dollars. It is alleged that Marcus Daly was the leading spirit in these trespasses and conversions, but it is charged in the bill that all of the defendants participated in the trespasses and conversions and in the division of the proceeds therefrom. It is also alleged that these trespasses were in part committed through other agents and contractors. It is also alleged that for the purpose of making proof of the illegal acts difficult, the said Marcus Daly organized the various corporations named as defendants, and caused various portions of their property to be transferred from one to the other of said corporations. It is also alleged in the bill that complainant had granted to the Bitter Root Development Company, appellee, licenses to cut timber on small portions of the tracts of land described in the bill of complaint, but that said appellee and other defendants had gone outside of the ground covered by said licenses or permits, and trespassed upon the other lands of the complainant, and removed the timber therefrom. The appellant, in said bill of complaint, further alleges that complainant has not evidence or knowledge of the exact ex-

tent of said trespasses or of the value of the proceeds received by defendants therefrom. The bill further alleges that complainant has commenced, and there are now pending in said lower circuit court, actions at law to recover the value of the timber so taken by defendants. The bill further shows that Marcus Daly died on November 12, 1900, leaving an estate worth about twelve million dollars, consisting of real and personal property, located in the County of Deer Lodge, District of Montana, and elsewhere; and that Margaret P. Daly, wife of said Marcus Daly has been appointed qualified and is now the duly qualified and acting executrix of the estate of said Marcus Daly, deceased, having been so appointed by the District Court of Deer Lodge County, District of Montana. There is no allegation of insolvency of any of the defendants, or of their inability to fully respond to any judgment which might be obtained upon the facts set forth in the bill of complaint.

ARGUMENT.

We submit that even a cursory examination of the bill of complaint in this case will convince this Honorable Court that the complainant has no standing in equity but has a full, complete and adequate remedy at law for the alleged wrongs set forth in the bill of complaint; and that the demurrers of appellees were well founded and were properly sustained by the lower court. We will briefly discuss the questions raised by said demurrers in the order in which they are discussed in the brief of appellant, filed herein.

THE COMPLAINANT HAS A FULL, COMPLETE AND ADEQUATE REMEDY AT LAW IN AN ACTION FOR DAMAGES.

There are a great many general statements and allegations in the bill of complaint wherein charges of fraud and conspiracy are made; and it is repeatedly stated in terms that the complainant has no plain, adequate and complete remedy at law, and that the redress which could be afforded by a court of equity would be more efficient; but, stripping the bill of complaint of these general statements and allegations, and looking at the facts pleaded, it will readily be seen that complainant's action is one at law for trespass and conversion; and that the only difficulty, if any, which would confront the complainant in

an immediate trial of the action before a jury, would be the obtaining of exact and detailed evidence of the alleged trespasses by defendants. The gist of the bill of complaint is simply that complainant is the owner of a large quantity of land which is, in the main, described by sections and quarter sections, in the District of Montana; and that the defendants have wrongfully and without right entered upon these lands, and despoiled them of the valuable timber growing thereon. Complainant's remedy for these wrongs is plainly in an action for trespass and conversion. It is purely and simply a legal cause of action, in which the right involved is a legal one, and which the defendants are entitled to have tried by a jury. The fact that a *large* number of sections of land is involved, and that the trespasses have extended over a period of years, would in nowise change the nature of the action. The only difference between this and an action in which one quarter section of land is involved, and where but one trespass upon that quarter section had been committed is that in this case more proof would have to be offered. If complainant has proof sufficient, there could be no difficulty in presenting it and having the redress granted in a court of law and before a jury. If complainant has not the proof (and that is the only obstacle in the way of an immediate trial, as appears upon the face of this bill) it can obtain this proof more readily through an action at

law than through one in equity. The parties in an action at law would be the same—no more and no less than are joined in this action—in equity, although it is not clear from the bill how the defendant Margaret P. Daly, individually, can be made a party to any action at law or in equity under the facts stated in this bill.

The doctrine is so well settled in England by the course and practice of the chancery court, and in this country by such course and practice, and also in the Federal Courts by direct inhibition by Act of Congress, that parties cannot be deprived of their right of trial by jury where there is an adequate and complete remedy at law; and that where the relief claimed can be obtained through an action at law, courts of equity will refuse to interfere, that we will consume but little of the time of the court in discussing the proposition. The reports of the cases decided by the Supreme Court of the United States teem with decisions of that court in cases of conversion, trespass, actions for damages for fraud and conspiracy and, in fact, cases of every conceivable kind, both in tort and on contract, holding that whenever a complete remedy can be obtained at law, and whenever a legal right is the basis of the main cause of action, a court of equity has no jurisdiction, but we will content ourselves with referring the court to a few of the decisions.

See:

Pomeroy on Equity Jurisprudence (2nd Ed) Vol. 1, Section 178;

Foster's Federal Practice, Sec. 12;

Bate's Federal Equity Practice, Sec. 188;

Buzard vs. Houston, 119 U. S., 347;

Insurance Company vs. Bailey, 13 Wall. 616;

Dowell vs. Mitchell, 105 U. S., 430;

Parkersburg vs. Brown, 106 U. S., 500;

Amber vs. Choteau, 107 U. S., 586;

Litchfield vs. Ballou, 114 U. S., 190;

Root vs. Michigan L. S. R. Co., 105 U. S., 189;

Thompson vs. Allen County, 115 U. S., 550;

Texas Pac. Ry. Co. vs. Marshall, 136 U. S., 393;

Dumont vs. Fry, 12 Fed., 21;

White vs. Boyce, 21 Fed., 298;

Alger vs. Anderson, 92 Fed., 696;

In Buzard vs. Houston, supra ,the Supreme Court, in part, says:

"In the Judiciary Act of 1879, by which the First Congress established the judicial courts of the United States, and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.'

The effect of the provision of the Judiciary Act as often stated by this court is that 'whenever a court of law is competent to take cognizance of a right, and has

power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Hipp vs. Babin, 19 How., 271, 278. Ins. Co. v. Bailey, 13 Wal, 616, 621; Grand Chute v. Winnegar, 15 Wall., 373, 375; Lewis v. Cocks, 23 Wall., 466, 470; Root v. Railway Co., 105 U. S., 189, 212; Killian v. Ebbinghaus, 110 U. S., 568, 573. In a very recent case, the court said: 'This enactment certainly means something, and if only declaratory of what was always the law, it must, at least, have been intended to emphasise the rule and to impress it upon the attention of the court.' N. Y. Guarantee Co. v. Memphis Water Co., 107 U. S., 208, 215.

"Accordingly, a suit in equity, to enforce a legal right, can be brought only when the court can give more complete and effectual relief, in kind or in degree on the equity side than on the common law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in Watson v. Southerland, 5 Wall., 74; or where an agreement procured by fraud is of a continuing nature; and its recission will prevent a multiplicity of suits, as in Boyce v. Grundy, 3 Pet. 210, 215, and in Jones v. Bolles, 9 Wall., 364, 369.

In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. Parkersburg v. Brown, 106 U. S., 487, 500; Ambler v. Choteau, 107 U. S., 586; Litchfield v. Ballou, 114 U. S., 193."

In Insurance Company vs. Bailey, supra, the doctrine is briefly stated, as follows:

"Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this district. Much consideration was given to the construction of that section of the judiciary act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court without hesitation came to the conclusion that he could not, if his remedy at law was as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury (Citing) Foley v. Hill, 1 Phillipp, 399; S. S. 2 House of Lords Cases, 28; Fire Insurance Co., v. Delavan, 8 Paige Chancery, 422; Alexander v. Muirhead, 2 Dessausure, 162; 5 American Law Reg., 546."

In complainant's bill it is repeatedly stated that the remedy at law will not be adequate, and that for some

reason that does not appear from the bill it could not there obtain as complete redress as could be afforded by a court of equity. Upon the same proofs which must be presented to a court of equity, a judgment could be obtained in a court of law. A decree in equity would not more readily than the judgment in the action at law furnish the complainant a means of collecting a sum sufficient to compensate it for the injury done to its premises. We cannot conceive of a plainer case of legal right, or one where complainant's procedure at law would be simpler.

COMPLAINANT, PRESENTING ONLY AN UNLIQUIDATED CLAIM FOR DAMAGES, HAS NO STANDING IN A COURT OF EQUITY.

Before a party can come into a court of equity and seek relief he must reduce his claim, whether it be for unliquidated damages or upon contract, to judgment. In other words, his right to a recovery at all, whether it be in damages for tort or a recovery upon contract, is a legal right, and one triable by jury. And this right must be determined, and a judgment entered before he can seek the interposition of equity.

See:

Swan Land and Cattle Co. v. Frank, 148 U. S. 603;

Cates v. Allen, 149 U. S., 451;

Scott v. Neeley, 140 U. S., 106.

THE BILL CANNOT BE SUSTAINED ON THE GROUND THAT IT IS BROUGHT TO ESTABLISH A TRUST.

While there are some allegations in the bill of complaint to the effect that some of the property belonging to the Daly Estate, and the various corporations named as appellees, was acquired through the proceeds of trespasses upon complainant's lands, it is not urged in appellant's brief, and was not urged in the court below by appellant, that jurisdiction is claimed by reason of these allegations; but, in any event, such a contention could not be maintained upon the facts set forth in this bill of complaint.

In the first place, we know of no authority holding or intimating that a trust, constructive or otherwise, could arise through a trespass or conversion. It is only where property has been obtained through fraud or a breach of duty by one standing in a fiduciary capacity that the property thus obtained can be impressed with a trust for the benefit of the injured parties.

In the second place, there are no facts pleaded in this bill sufficient to justify any such relief. Whatever loss complainant may have suffered was the result of naked unlawful trespasses. It was not deprived of its property through any fraudulent misrepresentation or concealment, nor did any of the defendants stand in the position of agent or trustee of any sort to complainant. It is not

shown of what specific property complainant was deprived nor in what manner or into what property or character of property the same was converted. Appellant does not contend, and cannot contend, that by this bill it is seeking to follow any property of which it claims to have been deprived.

THE BILL OF COMPLAINT SHOWS THAT THE COMPLAINANT HAS ELECTED TO PROCEED AT LAW TO RECOVER THE DAMAGES TO WHICH IT IS ENTITLED.

The bill of complaint alleges that the complainant has commenced actions at law to recover the value of the timber taken by defendants, and that said actions are still pending. It is not only apparent from the facts stated in the bill that complainant has a complete remedy at law, but the bill shows that complainant has recognized that fact, and at the time of filing this bill in equity it had brought, and then had pending, actions at law to recover for the trespasses and conversions referred to in the bill. Even if equity had jurisdiction concurrent with law over these matters, after complainant has elected to proceed at law, it is precluded from going into equity. There is no reason shown in the bill, except the lack of evidence (and that could readily be obtained in a law action, as we will hereinafter show) why complainant does not prosecute these law actions to judgment; and certainly it could

there obtain all that could be afforded it by a court of equity. But, in any event, by making its election of remedies, conceding that there was a choice between law and equity, the complainant, upon this fact appearing, is properly relegated to the actions at law.

Pomeroy's Eq. Jurisprudence (2nd Ed) Vol. 1, Sec. 179.

NO EQUITY JURISDICTION ARISES BY REASON OF THE FACT THAT MARGARET P. DALY, APPELLEE, IS SUED AS EXECUTRIX OF THE ESTATE OF MARCUS DALY, DECEASED.

As the second ground for equity jurisdiction in the lower court, we find the more than novel proposition advanced in the brief of appellant that because of the fact that courts of chancery exercise jurisdiction over executors and administrators in certain cases, and because of the fact that Margaret P. Daly in this case is sued as executrix, therefore full jurisdiction over the entire controversy was vested in the lower court.

In support of this contention counsel for appellant cites a number of cases in which chancery courts have exercised jurisdiction over controversies in which executors and administrators were involved. This jurisdiction arises partially from the fact that the executor or administrator is considered a trustee for the heirs, distributees and creditors. As stated in the citations in appellant's

brief, and particularly in the excerpt from Pomeroy, on page 32, an executor is considered a trustee only for *legatees*, *distributees*, and *creditors*. A court of equity has not jurisdiction of every case brought against a trustee, but only of cases which grow out of the trust relation and by and between the parties between whom the trust really exists.

In this case Margaret P. Daly, as executrix, is in no sense of the word a trustee for complainant or any other party, who presents a claim in tort for unliquidated damages.

In an action at law, brought upon a legal right, an executor or administrator has the same right of trial by jury as any other party, and the action must be prosecuted at law. In this case Margaret P. Daly is sued as executrix, as are the other defendants, for damages for trespass and conversion committed by her intestate. If complainant recover judgment in the actions at law, this judgment would then be a debt against the estate, and payable as other debts out of the funds in the hands of the executrix. To upheld the apparent contention of counsel for appellant in this regard would be simply to hold that every action, brought against an executrix or other trustee of any character, whether brought by the *cestui que trust* or by an entire stranger to the trust, as is complainant in this case, could be maintained in a court of equity; and

that the courts of law are closed to executors and other trustees.

In this case there is no allegation that Mrs. Daly has concealed or misappropriated or misapplied any of the assets of the estate. The bill simply alleges, that as executrix she is now holding an estate of about twelve million dollars which was left by Marcus Daly, who was the principal party in the trespasses and conversions set forth in the bill of complaint. Even a creditor of an estate is not such a *cestui que trust* of the executrix as will enable him to maintain a bill in equity against the administrator for the establishing and payment of his claim, merely on the ground of trust relation, in the absence of charges of fraud, mal-administration or non-administration on the part of the executrix.

Walker v. Brown, 58 Fed., 23;

And the same case, affirmed by the Circuit Court of Appeals, in the 63rd Fed., 204.

Upon an examination of the authorities cited in this connection in appellant's brief, without referring to them in detail, it will be seen that in every case where jurisdiction was exercised by a court of equity in a case where an administrator was a party, it was not upon the sole ground of the trust relation, but because of other conditions which conferred jurisdiction upon the court. For instance, in some cases discovery of assets; in others discovery and

marshaling of assets and distribution among all of the creditors.

There is no charge of fraud against Mrs. Daly, as executrix. No discovery of assets is necessitated. She has ample funds to meet any judgment, which might be recovered.

Under the judicial systems in force in all the states of the United States, where probate courts are established for the purpose of administering upon estates of deceased persons and the distribution of the estates to heirs, creditors and other persons entitled thereto, what ground or reason can there be for seeking relief against an executrix in a court of equity upon a cause of action which can be prosecuted to judgment in an action at law? When the judgment is obtained, the claim can be presented and must be paid in due course by the executrix.

In the present case it is alleged that the executrix Margaret P. Daly has in her possession assets in amount about six times the aggregate of damages claimed by the complainant. That property is in the jurisdiction of the probate court of Montana in which the executrix was appointed. The federal court could simply enter a decree for that amount against the executrix; it could not reach out and take from the probate court of Montana a dollar of the money with which to satisfy that decree. Either as

a court of law or of equity the federal court could simply establish complainant's claim as a debt against the estate, and when it had done that its power would be exhausted under the facts alleged in this bill.

Byers v. McAuley, 149 U. S., 698.

NO JURISDICTION IS SHOWN BY THE BILL OF COMPLAINT UPON THE GROUND THAT COMPLAINANT IS ENTITLED TO INVOKE THE AID OF EQUITY FOR AN ACCOUNTING.

It is also contended in appellant's brief that the lower court had jurisdiction of this cause, and that the bill of complaint states grounds for equitable relief, because of the concurrent jurisdiction which the courts of equity exercise over matters of accounts and accounting.

In the first place, there is no relation between the complainant and the defendants, or any of them, which would support an action for accounting, either at common law or in equity. The defendants are charged in the bill as joint tort feasors. Complainant's action upon the facts alleged is for trespass and conversion. To maintain an action for accounting, either at law or in equity, there must be between the parties either a privity, by contract or consent, or a privity in law, such as a guardian, trustee or some other fiduciary relation. Against a defeasor or

mere wrong-doer no action for accounting will lie. The fact that the controversy embraces a series of torts, each of which would have to be proven by separate and distinct evidence, would not alter the nature of the case.

Whitwell v. Willard, 1 Met. (Mass) 216;

Stringham v. Winnebago County, 24 Wis. 594.

Conklin v. Busch, 8 Pa. St., 514.

Brinsmaid v. Mayo, 9 Vermont, 30.

It is true, as stated by counsel for appellant, that among the subjects over which equity exercises concurrent jurisdiction with the law is that of account or accounting. But, as in any other case, where the remedy at law is complete, equity cannot interpose. Wherever courts of equity have taken jurisdiction in matters of accounting, it has been for the reason that the accounting was mutual and intricate or, if upon one side only, great complexity or difficulty existed, that prevented a court of law or a jury from efficiently trying the same.

See:

Pomeroy's Eq. Jur. (2nd Ed.), Sec. 1421.

Washburn Mfg. Co. v. Freeman Wire Co., 41 Fed. 410;

Baker v. Biddle, 2 Fed. Cases, 764;

Ely v. Crane, 37 N. J. Eq., 157,

Paton v. Clark, 156 Pa., St., 49; 29 At. 116.

Lafond v. Lassere, 56 N. Y. S., 459;

Smith v. Bodin, 74 N. Y., 30.

In Washburn Mfg. Co. vs. Freeman Wire Company, 41 Fed., 410, supra, the rule is stated by Judge Thayer as follows:

> "A case does not become one of equitable cognizance merely because an accounting is prayed for or because it is proper or even necessary to take an account, as courts of law are competent to deal with suits of that character. * * * * * To authorize a decree for accounting, either as to profits or damages to which a complainant is entitled under the patent laws, the court must first acquire jurisdiction of the cause on some well defined equitable ground."

In each of the cases cited in appellant's brief where courts of equity have taken jurisdiction in cases of actions for accounting, it will be seen that the jurisidiction was based not upon the fact that the suit involved an accounting, but because in each case it was shown that the accounting could not be fairly and adequately had in a court of law, or that there was jurisdiction in equity, because of fiduciary relations between the parties, or on some other well settled ground for equitable interposition.

On page 35 of appellant's brief, a quotation is given from the opinion in the case reported in 5 Pet., 495, to the effect,

> "That in all cases in which an action for account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted."

From an examination of the case itself it will be seen

that this excerpt standing alone does not show the true meaning of the court. The decision clearly affirms the rule that it is not every transaction in which an account is to be adjusted which can be taken into a court of equity; but that some serious difficulty at law must interpose before recourse can be had to equity.

In the present case the acts complained of against the defendants were separate and distinct acts of trespass upon and conversions of complainant's property. The bill simply charges a series of torts extending over a period of years. Under no circumstances could the defendants be called upon to account to the complainant, either in an action at law or in equity. Complainant must present its proof and obtain its judgment for damages as for any other species of tort. But conceding that defendants could be called upon to account, what difficulty would be presented in trying the case in a court of law. The proof could be presented by complainant upon a series of trespasses the same as for one. We cannot see why a jury could not intelligibly render a verdict upon proofs properly presented for trespasses amounting to two million dollars as for any less sum; for trespasses covering a period of years as for any less period, and for trespasses great in number as for one trespass. The fact that the account involved a great number of items, all on one side, would surely not present a case beyond the ability of a jury to cope with. The aggregate of the items could certainly be presented by wit-

nesses, and nothing of difficulty left for the jury to do or determine.

But counsel for appellant seems to contend that the present case presents one of mutual accounts; and this is based upon the charge that the complainant had granted to the defendants licenses to cut timber on certain small portions of the tracts mentioned in the bill, and that instead of confining themselves to the ground covered by the licenses, the defendants entered upon other tracts adjacent thereto, and unlawfully took timber therefrom. How this presents a case of mutual account or mutual items of account we are unable to comprehend. As argued in a subsequent portion of appellant's brief, if the defendants cut any of the timber in question under the licenses or permits from the government, it is incumbent upon the defendants to set up and prove such permission, and that the cutting was done in accordance with such permission. If, in this case, the defendants should prove that they had a right to cut upon certain of the lands described in the bill of complaint, this would simply except from complainant's right of recovery the lands covered by the licenses, and would leave the case in the same condition as if the defendants met complainant's charges and proofs by evidence that upon a portion of the lands described in the bill of complaint they had not cut timber or trespassed at all. It certainly would not be presenting any cross-items or charges against the complainant, or presenting in any manner mutual

items or mutal accounts, or even credits in the ordinary sense of the term. Under the theory of complainant's counsel if the defendants should prove that the bill was entirely unfounded, and that they had not cut timber from any of the land mentioned in the bill, it would be presenting a case of mutual account.

THERE IS NO NECESSITY FOR A RESORT TO EQUITY IN ORDER TO PREVENT A MULTIPLICITY OF SUITS.

The fourth ground upon which appellant contends that the demurrers should have been overruled by the court below is that the bill shows that this action is necessary in order to avoid a multiplicity of actions at law.

In the first place, the bill alleges that actions at law have been commenced and are now pending to recover for these trespasses. From this allegation it must be presumed that the complainant has brought all the actions at law which can be brought, or which might be necessary to cover the trespasses complained of. As the complainant, before the filing of this bill, had brought all of the actions that it could bring against these defendants or any of them, it is difficult to see how this action could avoid a multiplicity of actions at law so far as these defendants are concerned.

In the second place, under the allegations of this bill no more actions at law would be necessitated than in equity. These defendants are liable, if liable at all, under the alle-

gations of this bill, as joint tort feasors and they are so charged. It is alleged that the individual defendants conspired together and jointly committed the acts or contributed to the commission of the acts complained of. The corporations are charged in the same manner. Under the allegations they are all jointly liable for the damages claimed to have been sustained by complainant; and they could certainly be made joint defendants in an action at law. The fact that the defendants committed a portion of the trespasses through agents and employes, or through contractors or persons whom they induced to cut the timber and then purchased the same from them, or that the timber was cut and purchased from persons, or taken from persons, who were induced by defendants to believe that defendants had a right to cut the same, in nowise changes the situation. If these facts are true, the defendants are liable directly and personally for the timber cut through agents and through contractors, the same as if they had personally and individually committed the trespasses.

If it is not necessary to join these various contractors and agents and employes in a bill of equity, in order to completely dispose of the matter, then it will certainly not be necessary to join them in actions at law, or to bring separate actions at law against them. If it would be necessary to sue all of these various other individuals and persons separately or jointly in actions at law, then they are

certainly indispensable parties to this or any other action in equity in order to completely dispose of the controversy.

The fact that the trespasses charged ran over a period of a good many years would necessitate but one action at law. The fact that the trespasses were committed upon numerous tracts of ground would make no difference, as the defendants could be sued in one action at law for all of the trespasses upon any or all of complainant's premises, whether on one or a thousand tracts, the same as they are attempted to be sued in this action in equity.

The cases cited by counsel for appellant in this action have no application, for the reason that this is not a case of one party having a right against a number of persons which could be determined as to all of the parties in one suit in equity, but at law would involve separate and distinct actions, and is not a case which involves a fund or property in which a great number of persons are interested; all of whom must be before the court in order to completely and effectually dispose of all contentions which might be raised as to the property or funds.

COMPLAINANT IS NOT ENTITLED TO DISCOVERY UNDER THE ALLEGATIONS OF THE BILL OF COMPLAINT.

The complainant's bill upon its face appears to be a bill for general relief in which the discovery sought is merely incidental.

But from the position taken by counsel for appellant in the lower court, and from portions of the bill itself, it would appear that the discovery is the main relief sought and desired by appellant. It is apparent from the bill that the only difficulty, if any, which would confront appellant in proceeding to immediate trial in an action at law, to recover for the torts set forth in the bill, is the lack of evidence. But upon an examination of the bill, we submit that it fairly appears that the case does not fall within any of the well-defined or recognized heads of equity jurisprudence cognizable in a federal court of equity; and therefore we can eliminate from the bill everything which supports the prayer for relief other than discovery; and, in that event, the entire bill must fail because it cannot be maintained for the sole purpose of discovery.

Complainant's remedy, being clearly in an action at law, there is no necessity for going into a court of equity to procure evidence in aid of that action. Prior to the passage of the Acts of Congress, making provision for the calling of parties as witnesses, and for the production of papers and documents, it was sometimes held that a court of equity would maintain a bill for discovery in aid of an action at law; but since the adoption of the provisions of Section 858 of the Revised Statutes of the United States, by which parties are placed upon the same plane as witnesses as any other persons, and the sections immediately subsequent to Section 858, providing for the production by witnesses of all books, papers and other documentary evidence, and of Section 724, providing for the production on notice of the books, papers, documents, etc., all necessary evidence and all information within the control of the opposing

parties may easily and readily be obtained in the action at law. And since the adoption of these statutes, the parties having full remedy in the law action, and there being no necessity for a recourse to equity, the courts of chancery, and particularly the Federal Courts, have clearly established the doctrine that a bill for discovery alone cannot be maintained.

Safford v. Ensign Mfg. Co., 120 Fed., 480;

Brown v. Swan, 10 Pet. (U. S.), 497.

Rindskoff v. Platto, 29 Fed., 130;

Preston v. Smith, 26 Fed., 885;

U. S. v. McLaughlin, 24 Fed., 823;

Ex parte Boyd, 105 U. S., 647;

Paton v. Majors, 46 Fed., 210;

Home Ins. Co. v. Stanchfield, 1 Dillon, 420;

Federal Case No. 6660.

In Safford v. Ensign Mfg. Co., supra, the court, through Circuit Judge Goff, says:

"It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States, because under section 724, Rev. St., it is no longer generally needed. See Rindskoph v. Platto (C. C.) 29 Fd. 130. * * * * From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would violate the doctrine laid down by Justice Field in Scott vs. Neely, supra, and would permit, by indirection the entertaining of a bill for discovery, although the trend of authority is that a pure bill for discov-

ery cannot be maintained in the federal courts, because it is no longer necessary. For these reasons, I am of opinion that the demurrer should be sustained and the bill dismissed." In Brown v. Swan, supra, the Supreme Court says:

"The jurisdiction of a court of equity in this regard rests upon the inability of the courts of common law to obtain or to compel such testimony to be given. It has no other foundation, and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness to prove what is sought from the conscience of an interested party."

The present case presents no exception to this rule. So far as the individual defendants are concerned, they can be called as witnesses and compelled to produce their books, papers, documents, and whatever knowledge they have that may be pertinent can readily be obtained in this manner.

So far as the corporation defendants are concerned, whatever knowledge they have must rest either with their officers and agents, past or present, or in their books, papers and documents. A corporation could have no knowledge outside of these sources. The books, papers and documents could be obtained upon demand and notice in the law action. The officers and agents, past or present, can be called as witnesses, and be compelled to produce whatever documentary evidence they may have.

If appellant's contention, that the prayer for accounting and allegations of necessity for discovery are sufficient to confer jurisdiction of this entire cause upon the lower Court, be maintained, then every action at law, to recover for trespasses or other series of torts, could be brought and maintained in equity by simply asking for an account, and alleging that it was necessary that plaintiff be permitted to secure evidence from the defendants. Upon allegations as to the necessity for discovery there can be no issue or trial. Upon a bill properly framed, the defendants must make the discovery in their answer. All that need be alleged concerning the account, is that complainant needs and desires it. So that, if this doctrine prevail, in this class of cases, and in fact in all cases, even where the purest of legal rights are involved, parties could be deprived of their right of trial by jury, simply by an ingenious framing of a *so-called* bill in equity.

So that whether the element of discovery, under this bill, is considered as standing alone, or as claimed by counsel for appellant to be sufficient to confer jurisdiction of the entire controversy upon the court and to warrant the court in proceeding to grant all of the relief prayed for, we submit that the jurisdiction of a federal court of equity is in no wise aided by the allegations of the bill looking to a discovery.

In addition, under the Supreme Court Equity Rule numbered 40, as it stands since its repeal, or partial repeal, and under rule numbered 41, where a complainant desires to obtain specific discovery by defendants of any facts, special interrogatories must be framed and specified in a note at the foot of the bill.

See, Daly v. Young, Fed. Case, 751.

In the case at bar, there being no special interrogatories directed to any of the defendants, it is doubtful whether any discovery could be claimed in this action beyond such books, papers and documents and documentary evidence as defendants might have; and these could readily be obtained as before stated, by demand and notice in the action at law.

Counsel for appellant has cited a number of cases to the effect that even since the passage of the Revised Statutes, Sections 724, 858, etc., the federal equity courts have compelled discoveries. Upon an examination of these cases it will be seen that in each case the main relief asked was based upon some well settled head of equity jurisprudence; and the discovery sought merely incidental to the main relief asked; and the court simply held that, having obtained jurisdiction of the action in equity, and it being a proper case for equitable relief, the court would then proceed to grant discovery or any other incidental relief prayed for.

We have been unable to find a single authority, State or Federal, holding that for pure discovery alone a bill can be maintained.

(a). There is a further ground for denying the complainant's right to maintain this bill for discovery, and that is, that the defendants cannot be compelled to answer upon any matters or to disclose any evidence which might subject them or might tend to subject them to, or in any way lay the basis for, criminal prosecutions or other proceeding which might result in the imposing of a penalty.

In this case the bill alleges (Trans. p. 30) that the acts of the defendants were "in violation of the laws of the United States, both civil and criminal." Outside of this specific allegation it is apparent upon the face of this bill that any evidence, which might be disclosed, or which would show or tend to show that the defendants had wrongfully entered upon the public domain and cut and removed timber therefrom, would subject them to criminal prosecution for such trespasses. Neither upon the witness stand, nor through the means of discovery in equity, could the defendants be compelled to incriminate themselves by answer or by production of any documentary evidence.

See,

Bates' Fed. Eq. Prac., Sec. 136 and Sec. 266;
Foster's Fed. Prac. (3rd Ed.), Vol. 1, p. 290;
Boyd v. U. S., 116 U. S., 616;
Lees v. U. S., 150 U. S., 476 and 478;
Leggett v. Postley 2 Paige Ch., 599;
Livingstone v. Harris, 3 Paige Ch., 528;
State v. Saline Bank, 1 Pet., 100.
Warren v. Holbrook, 95 Mich., 195; 54 N. W., 712.

But counsel for appellant argues that where the criminal prosecution or liability to penalty is barred by lapse of time, the defendants cannot escape making discovery.

Upon the bill of complaint in this action it clearly appears that the acts complained of are crimes. The bill does not show when the acts were committed. In other words, it cannot be determined from the bill of complainant that the statute of

limitations has run as to the acts upon which discovery is sought, and there certainly can be no presumption indulged in that criminal prosecutions are barred.

Again, counsel for appellant argues that as to Margaret P. Daly, executrix, there can be no criminal prosecution or accusation. In some portions of the bill it is alleged (one allegation being found on page 30 of Transcript) that all of the defendants participated in these trespasses. But if nothing personal is intended to be charged against Mrs. Daly in the bill, we submit that the facts alleged are insufficient to compel any discovery or disclosure from Mrs. Daly, because it is not shown that she has any personal knowledge or books or other documentary evidence pertinent to the issue.

Certainly the other defendants, both individuals and corporations, would lay themselves liable to criminal prosecution if they were able to reveal facts as charged in the bill.

(b). *Complainant is not entitled to a discovery for the further reason that the bill is insufficient to show that the discovery is sought in aid of any action at law, conceding for the purpose of this argument that a discovery could be maintained in aid of such action.*

The bill alleges that law actions have been brought, and are now pending, against the defendants, or some of them, to recover for the trespasses referred to in the bill. But, while this allegation is undoubtedly sufficient to show that a recovery is being sought at law for the trespasses complained of, in order to obtain a discovery from any of these defendants it is neces-

sary that the bill allege that said defendants are parties to the law actions, and that this action is ancillary to and in aid thereof.

1 Bates' Fed. Eq. Prac., Sec. 199, page 266.

COMPLAINANTS CANNOT INVOKE THE AID OF EQUITY BY REASON OF ANY FRAUD, MISREPRESENTATION OR CONCEALMENT ALLEGED IN ITS BILL OF COMPLAINT.

The learned counsel for appellant argues briefly that because of the jurisdiction exercised by courts of equity in cases of fraud, misrepresentation and concealment, the lower court should have taken jurisdiction of this action upon that ground.

In the first place, there is no allegation in the bill that any fraud, misrepresentation or concealment in any way enters into complainant's cause of action. The cause of action is in tort for damages for wilful, bold and naked trespasses and conversions. There is no charge that the defendants secured possession of complainant's ground, or were assisted or enabled in any way in the taking and conversion of complainant's property by means of any fraud or fraudulent statement or acts or misrepresentations or concealment. The only fraud, misrepresentation and concealment referred to in the bill was that the cutting was done through the cloak of corporations and various persons, and that the transactions were carried on in such a manner that it was made difficult for complainant to procure satisfactory evidence to support its cause of action.

This suit is not brought on account of the suppression of evidence, or of any fraud, misrepresentation and concealment in connection therewith, but is brought to recover for the wrongful trespasses upon, and the taking of plaintiff's property and the conversion thereof.

Even if a fraud or concealment entered into the cause of action; as stated in Buzard v. Houston, 119 U. S., 347, it is not every case of fraud which is cognizable in a court of equity. Actions for damages sustained through fraud; actions of deceit, and, in fact, every cause of action, whether it arises through fraud or otherwise, where the remedy is a legal one for damages, must be brought and prosecuted at law.

Further, the allegations of the bill as to fraud, misrepresentation and concealment, are too general and indefinite to sustain the bill upon this ground. While it is true that the evidence itself of a fraud need not be pleaded, still the bill must allege the specific acts or language which constitute the fraud, and not the mere unsustained conclusion of the pleader that fraud has been committed.

In this bill there is no statement as to what any of the defendants actually did which amounted to a fraud upon the government,—how, where or when it was done; but simply the allegation that certain results were accomplished in fraud of complainant's rights.

THE BILL IS SO GENERAL, UNCERTAIN AND INDEFINITE THAT IT PRESENTS NO GROUNDS FOR RELIEF OR DISCOVERY IN EQUITY.

Certain objections, upon the grounds of uncertainty and insufficiency are presented against the bill in this case, by the demurrers filed, and while it is clear that the demurrers in this respect are well founded, and that the bill in many respects is insufficient and uncertain, we regard the propositions heretofore issued, so clearly decisive of our contention that under this bill, complainant has no standing in a court of equity, that we do not feel justified n argning these objections at length.

But we respectfully submit that a mere reading of the bill will disclose that no attempt is made to allege how any of the alleged acts of defendants were fraudulent or how complainant was injured by any of the alleged acts of conspiracy or fraud, or how any acts of the defendants, in organizing corporations or otherwise, complicated the situation or made detection difficult or impossible, or concealed from complainant any facts in the case. Nor is it sufficiently averred how the alleged frauds were committed or what means were used to conceal them. There are no facts alleged in the bill which would enable the Court to determine for itself that frauds had been committed or a conspiracy organized and carried out which resulted in any injury to complainant. In fact it appears from the bill that whatever difficulty complainant may be laboring under, is not due to any acts of defendants but to complainant's delay and negligence in not sooner asserting its rights, if any it has, and in not soner obtaining and preserving evidence with which to pros-

ecute any violation of those rights. The bill is also uncertain and insufficient in that it shows that from portions of the lands described in the bill, defendants have the right to cut timber by reason of direct permits and license issued by the complainant. Knowledge of what these permits are must lie with complainant, and as complainant shows by the bill that it does not intend to dispute the permits or the rights granted thereunder, we submit that the bill should show what lands should be excepted from it, and should be confined to premises concerning which complainant alleges it has a cause of action.

We respectfully submit that irrespective of the jurisdictional defects in said bill, that the said demurrers were well founded, because of the uncertainty and insufficiency of the bill.

In conclusion, we respectfully submit that the only resemblance which the bill of complaint in this case bears to a bill sustainable in equity is in its form and in the ingenuity displayed by counsel in the frequent use of terms encountered in equity practice, such as "fraud," "account," "trust," etc., and stripping the bill of all unnecesary phraseology and verbiage, and looking only to the facts alleged, the controversy presented is reduced to a simple, naked, concrete proposition of law. It presents a claim or money demand for unliquidated damages growing out of wilful trespasses and conversions supportable in a court of law alone. Complainant has recognized this by already filing its law actions. There is no equity presented; no reason for asking the interposition of a court of equity,, and we respectfully submit that the action of the lower

court in sustaining the demurrers, and dismissing the bill, was proper, and should be approved and affirmed by this Honorable Court.

Respectfully submitted,

W. W. DIXON, A. J. CAMPBELL, A. J. SHORES, C. F. KELLEY, JOHN F. FORBIS and L. O. EVANS,
of Butte, Montana, Solicitors and of Counsel for Appellees.

No. 1047

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a corporation), ANACONDA MINING COMPANY (a corporation), ANACONDA COPPER COMPANY (a corporation), ANACONDA COPPER MINING COMPANY, (a corporation), MARGARET P. DALY, MARGARET P. DALY, as executrix of the estate of Marcus Daly, deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON and DANIEL J. HENNESSY,

Appellees.

} In Equity

ADDITIONAL BRIEF AND ARGUMENT FOR APPELLEES.

W. W. DIXON, A. J. CAMPBELL, A. J. SHORES, C. F. KELLEY, JOHN F. FORBIS and L. O. EVANS, of Butte, Montana, Solicitors and of Counsel for Appellees.

THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

BITTERROOT DEVELOPMENT COMPANY (a Corporation), ANACONDA MINING COMPANY (a Corporation), ANACONDA COPPER COMPANY (a Corporation), ANACONDA COPPER MINING COMPANY (a Corporation), MARGARET P. DALY, MARGARET P. DALY, as Executrix of the Estate of Marcus Daly, Deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON and DANIEL J. HENNESSY,
Appellees.

Additional Brief and Argument for Appellees.

In Appellant's Brief filed in this cause there are specified and discussed a number of grounds upon which it is contended equitable jurisdiction was conferred by the bill of complaint upon the lower court. Upon the oral argument before this Court there was

argued and authority cited in support of an additional ground for asking a reversal of the action of the lower court—that is, that the action is maintainable in equity for the purpose of declaring a trust in property possessed by the defendants. This proposition while seriously urged by counsel for appellant in the argument was evidently considered of such slight improtance that it was entirely overlooked in the presentation in Appellant's Brief of the theories upon which the bill was framed and presented in equity. But we submit that the contention of counsel for appellant in this connection affords no ground whatever for equitable interposition in this cause.

In the first place, under the general rule, the application of the principle that equity will follow and declare a trust in property for the benefit of the real owner, where money or other property has been misapplied, is confined to cases where the misapplication or misappropriation has been done by parties standing in some fiduciary relation to the wronged party.

Perry on Trusts, 5th ed., vol. 1, sec. 128, page 170, and cases cited.

Hawthorn vs. Brown, 3 Sneed (Tenn.), 462.

Counsel for appellant has cited two cases:

Newton vs. Porter, 69 New York, 163.

The American Sugar Refining Co. vs. Fancher, 145 New York, 552.

to the effect that the same principle will be applied where the trust arose through a tort. Even a cursory examination of these cases will disclose the fact that

each is based upon the peculiar facts appearing therein, and they only affirm and strengthen our contention that the bill of complaint in the case at bar states no facts justifying equitable interference on the ground that complainant is entitled to follow the proceeds claimed to have been received from the conversion and sale of its timber.

In the case of Newton vs. Porter, 69 N. Y. 133, certain bonds had been stolen from plaintiff by parties who had sold them, and the proceeds had been invested in other securities. The parties who had stolen the bonds were absolutely insolvent. The plaintiff was without remedy except to follow the proceeds of the bonds into the purchased securities. The proceeds from the sale of the bonds were clearly identified and followed into the securities claimed. There was clearly no remedy at law, and the only redress which could be afforded plaintiff was to declare her to be rightfully entitled to the securities purchased with the proceeds of her property.

In the case of American Sugar Refining Company vs. Fancher, 145 N. Y. 522, the proceeds of the sale of personal property induced by fraud was followed by the vendor and identified specifically and beyond question in the hands of a voluntary assignee of the vendee. The vendee, the party committing the fraud, was hopelessly insolvent. There was no remedy at law or other redress that could be afforded the plaintiff than to permit him to follow his property into the hands of the assignee.

In each of the foregoing cases, as in all cases in equity, jurisdiction was maintained by the Court, solely upon the ground that there was no remedy at law, in each case the parties committing the wrong being hopelessly insolvent.

In the case of the American Sugar Refining Company vs. Fancher, supra, the Court emphasizes the fact that it would not proceed in equity, in the absence of a showing that no legal remedy was available and adequate, in the following language:

"When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, *where there is no adequate legal remedy,* either on the contract of sale or for the recovery of the property in specie, or by *an action of tort,* is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes or credits are *identified beyond question* in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power, which to our minds has any force, is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) *that nothing will be adjudged as proceeds except*

what can be specifically identified as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a bona fide purchaser is found."

In the case at bar, complainant has a plain, speedy and adequate remedy at law in an action for damages against defendants. If the Daly Estate profited by the tort, as is alleged in this bill, then the executrix can be joined with the others in the action for damages. Under the bill none of the defendants is alleged to be insolvent, and each of them is presumed to be fully able to respond to a proper judgment. Complainant can much more readily obtain full redress through a judgment at law for whatever damages it has sustained than in this action or any form of action in equity.

In the second place, conceding that complainant could disregard its remedy at law and appellees' right to a jury trial and proceed in equity, we submit that there is absolutely nothing in the bill of complaint which would sustain an action to declare a trust in or to follow the proceeds of complainant's property into any property of any of the appellees. There is not only an absence of the absolutely essential allegations which would identify and ascertain the property into which complainant claims the proceeds of its timber have been converted, but in fact the allegations of the bill positively negative the possibility of any such identification or ascertainment.

In the bill, transcript, pages 23, 29, and 30, it is stated that it is impossible to allege who appropriated the pro-

ceeds of the sales, when they were appropriated, in what way, or what became of them. The only allegation in the bill which charges that the proceeds of the trespasses went into any property now in existence is the following allegation found on page 52 of the transcript:

"That a large portion of said asset was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator as hereinbefore charged."

This allegation refers only to the Daly Estate.

Whenever the doctrine that a trust will be deemed created out of property purchased with funds obtained by fraud or funds that have been misappropriated or misapplied, the rule is laid down clearly that the first essential to the maintaining of the suit is that the lands sought to be impressed with the trust, must be clearly described and identified, and the money wrongfully used or misappropriated must be definitely traced and clearly proved to have been invested in the lands. Where the trust money has been mingled with other moneys so as to be indistinguishable and its identity lost, no trust in any specific property can arise.

This proposition is also clearly and repeatedly recognized in the New York cases above referred to, and cited by counsel for appellant.

See Pomeroy Eq. Juris., 2d edition, vol. 3, secs. 1048, 1051, 1058, 1080.

Ferris v. Van Vechten, 73 N. Y. 113.

In Ferris vs. Van Vechten, supra, the rule is stated as follows:

"The money paid by the trustee for lands or other property or for choses in action sought to be subjected

to the original trust must be identified as trust moneys, and this is clearly recognized in all the cases, and, in very many of them, this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is that when the trust fund has consisted of money and been mingled with other moneys of the trustee in one mass, undivided and indistinguishable, and the trustee has made investments generally from money in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investment."

In the case at bar, there is no claim made that it can be shown that any moneys derived from any of the alleged trespasses had been kept separate or could be identified or traced in any manner. In fact, the bill shows that the proceeds have been intermingled, and sent in every direction. In every case of trespass and conversion where the defendant has property at all, the same allegations might be made, and the action maintained in equity. All that would be necessary would be to allege just what is alleged in this cause, and that is that the defendant has property, has profited by the trespasses, and that therefore a portion of that property must have come from the proceeds of the trespass. Until complainant can present the Court with some facts as to who received the proceeds of its property, into what property or character of property the same was converted, and the other facts necessary to trace the complainant's funds or property into specific property

held by defendants, surely complainant cannot contend that it is in a position to have a trust declared.

But counsel for appellant may contend that in order to carry out his theory of trusts it is necessary that he have a discovery in order to get the necessary facts. In our original brief, we respectfully submit, we have clearly shown by the authorities cited, that a bill for discovery alone cannot be maintained, and where, as counsel for appellant states in his brief in this case, the case is for relief and discovery, when the facts stated are insufficient to entitle the complainant to relief, the discovery must fail also.

Venner vs. Atchison, T. & S. F. R. Co., 28 Fed. 581.

Everson vs. Equitable Life Assurance Co., 68 Fed. 258, and affirmed in 71 Fed. 570.

McLanahan vs. Davis, 8 How. (U. S.) 170.

In this connection, as upon other points urged in the case, the learned counsel for appellant contends that the bill should be sustained because it is apparent that the equitable remedy would be more efficient. Why it would be more efficient is not apparent from the bill. Surely, there would be no difficulty in proceeding to judgment in the ordinary course of an action at law. There would be no difficulty in issuing execution and collecting that judgment. The doctrine sometimes stated in equity that a party can proceed there if the remedy is shown to be more complete and efficient than at law, does not

refer to the fact that the procedure in equity generally may be clearer or more convenient, and has no reference to the convenience of parties or counsel in trying a case. It plainly means a more efficient remedy or result, and does not refer to the manner of reading that result. If a party is enabled in the ordinary course and procedure at common law to proceed and obtain and collect his judgment, he has no standing in equity, and the convenience or wishes of parties or counsel surely cannot be weighed against a constitutional right to trial by jury in all cases like the present one, where legal rights are involved.

There is no peculiar condition presented by the facts in this case. There is no reason presented for asserting that under the facts presented by this particular case, for any reason, either general or particular, a court of equity should interpose. The same condition would arise, and does arise, in every action of trespass and conversion where a series of torts is charged. It is immaterial to the defendants whether their controversy with the Government, upon the matters presented in this bill, is determined in a court of law or equity, but to sustain the complainant's contention is simply to work an upheaval of the entire system of Federal jurisprudence, and to hold that the right to a trial by jury is but a memory.

We respectfully submit the judgment of the lower court should be affirmed.

Respectfully submitted,

W. W. DIXON,

A. J. CAMPBELL,

A. J. SHORES,

C. F. KELLEY,

JOHN F. FORBIS, and

L. O. EVANS,

Of Butte, Montana,

Solicitors and of Counsel for Appellees.

NO. 1048

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Northern District of California.

Filmer Bros., Printers, 424 Sansome St., S. F.

INDEX.

Writ of Error (Original).

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, defendant in error, a manifest error hath happened, to the great damage of the said William Baer Ewing, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 15th day of March next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 16th day of February, in the year of our Lord one thousand, nine hundred and four (1904).

GEO. E. MORSE,
Clerk of the United States District Court, Northern District of California.

Allowed by:

JOHN J. DE HAVEN,
U. S. District Judge.

The answer to the Judge of the District Court of the United States for the Northern District of California to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify under the seal of said Court to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained in a certain schedule to this writ annexed as within I am commanded.

By the Court.

[Seal] GEO. E. MORSE,
Clerk.

[Endorsed]: No. 4065. United States Circuit Court of Appeals for the Ninth Circuit. William Baer Ewing, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Feb. 16, 1904, Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 15th day of March, 1904, pursuant to a writ of error duly issued and now on file in the clerk's office of the District Court of the United States, for the Northern District of California, wherein William Baer Ewing in plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOHN J. DE HAVEN, Judge of the United States District Court for the Northern District of California, this 16th day of February, 1904,

JOHN J. DE HAVEN,

United States District Judge, Northern District of California.

Due service of the within citation admitted the 16th day of February, 1904.

MARSHALL B. WOODWORTH,

United States Attorney.

[Endorsed]: No. 4065. United States District Court for the Northern District of California. William Baer Ewing, Plaintiff in Error, vs. The United States of America. Citation. Filed February 16th, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

UNITED STATES OF AMERICA, Plaintiff

vs.

WILLIAM BAER EWING and GEORGE B. CHANEY, Defendants.

No. 4065.

Praecipe for Transcript.

To the Clerk of the said District Court:

Sir: Please make return to the writ of error issued herein, by transmitting to the United States Circuit Court of Appeals for the Ninth Circuit true copies of the following, viz:

1. The indictment in full.
2. The written objections to the indictment.
3. Order overruling written objections to indictment.
4. Verdict.
5. Judgment.
6. Motion for a new trial.
6½. Order denying motion for a new trial.
7. Bill of exceptions.

8. Petition for writ of error.
9. Order allowing writ of error.
10. Order granting supersedeas.
11. Assignment of errors.
12. Transmit the original writ of error.
13. Transmit the original citation on the writ of error.
14. Transmit copy of cost bond.
15. Stipulation and orders extending defendant William Baer Ewing's time to prepare, serve and file bill of exceptions.
16. Attach certificate to above as being the return to writ of error, and also certify that copy of writ of error was lodged with clerk for defendant in error, on date of issuance of writ.

Dated, March 9th, A. D. 1904.

Respectfully,

FRANK McGOWAN,
BERT SCHLESINGER,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed March 9th, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

Indictment.

(Section 5480, R. S. U. S., as amended by Act of March 2, 1889, Vol. 25, U. S. Stat. at L., p. 873.)

At a stated term of said Court, begun and holden at the city and county of San Francisco, within and for the

Northern District of California, on the first Monday in November, in the year of our Lord one thousand, nine hundred and two.

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oath present: That

WILLIAM BAER EWING and GEORGE B. CHANEY, late of the Northern District of California, heretofore, to wit, on the thirty-first day of December, in the year of our Lord one thousand, nine hundred, at the city and county of San Francisco, in the State and Northern District of California, then and there being, did then and there devise a scheme to defraud Charles F. Dosch, Mary Hanson, Annie Guthrie and certain other persons whose names are to the Grand Jurors aforesaid unknown, but who were then and there at the several times of the correspondence hereinafter referred to, residents of the United States of America; which said scheme to defraud was to be effected by opening correspondence and communication with such persons, and by distributing advertisements, circulars, prospectuses and letters by means of the postoffice establishment of the United States, and by inciting such persons to open a correspondence through such postoffice establishment, with them, the said William Baer Ewing and George B. Chaney, concerning said scheme, and which said scheme was then and there as follows, to wit:

That on the thirty-first day of December, one thousand nine hundred, the said William Baer Ewing and George

B. Chaney devised that they should organize and conduct together, and they did so organize and conduct together a corporation under the laws of the State of California, to be called and styled the "Standard Oil Promotion and Investment Company"; that it was then and there devised by the said William Baer Ewing and George B. Chaney, that the said George B. Chaney should be held out, and he was held out to be the vice-president, and the said William Baer Ewing should be held out, and he was held out to be the secretary and treasurer of the said Standard Oil Promotion and Investment Company.

That it was further devised by and between the said William Baer Ewing and George B. Chaney, that it should be claimed and represented, and they did so claim and represent to the persons whose names are hereinbefore mentioned, and to the public in general, that the said Standard Oil Promotion and Investment Company had an authorized capital stock of $5,000,000; and that said company had a subscribed capital stock of $2,500,000, and that said Standard Oil Promotion and Investment Company had funds on deposit in the First National Bank, in the Western National Bank and in the Germania Trust Company, and that said Standard Oil Promotion and Investment Company was licensed by the United States Government, and that said company was organized for the purpose of promoting generally the oil industry of the Pacific Coast, that said Standard Oil Promotion and Investment Company promoted and organized and would promote and organize Oil Companies on a strictly first-class basis, and that said Standard Oil Promotion and

Investment Company acted and would act as the general representatives of such oil companies, taking full charge of the sale of stock and general development of their lands; that the said Standard Oil Promotion and Investment Company, financed and would finance incorporated oil companies of from $100,000 to $5,000,000 capitalization and put them on a paying basis.

That it was further devised by the said William Baer Ewing and George B. Chaney that they should falsely represent, and they did so falsely represent to the persons whose names are hereinbefore mentioned, and to the public in general, that the said Standard Oil Promotion and Investment Company was transacting and would transact a co-operative investment business in oil stocks and properties and was giving and would give to the investor of limited means the same great opportunities enjoyed by the "Kings of Finance" and "Market Leaders"; that the investments of all the investors in the said Standard Oil Promotion and Investment Company were and would be included in transactions representing thousands of dollars, and that said investors were receiving and would receive pro rata shares of the profits of their said investments every thirty days, as the said profits were or thereafter should be earned; that a complete statement, together with a check for all profits earned was and would be sent to all investors at the end of each month, and that the only charge which was or would be made by the said Standard Oil Promotion and Investment Company for its services to said investors, was and would be twenty

per cent of the profits of the said investors on their said investments.

That it was further devised by and between the said William Baer Ewing and George B. Chaney, that it should be falsely represented and they did so falsely represent to the persons whose names are hereinbefore mentioned, and to the public in general, that the said William Baer Ewing and George B. Chaney, the secretary and treasurer and vice-president, respectively, of the said Standard Oil Promotion and Investment Company, as hereinbefore set forth, had made, and each of them had made, a life-long study of oil throughout the United States, and especially the oil fields of California; that the judgment of the said William Baer Ewing and George B. Chaney, based on many years' experience, would earn thousands of dollars for those who should follow the advice of the said William Baer Ewing and George B. Chaney in all matters pertaining to oil; that the said Standard Oil Promotion and Investment Company, was investing and would invest only in first-class stocks and properties which they, the said William Baer Ewing and George B. Chaney had thoroughly investigated and knew to be desirable in every particular; that the said Standard Oil Promotion and Investment Company had been and was represented in every oil producing district of California and Texas, and that the operations of the said Standard Oil Promotion and Investment Company in the new Texas fields would make the earnings of the investors in the said Standard Oil Promotion and Investment Company, even greater than they had ever been before.

That it was further devised by and between the said William Baer Ewing and George B. Chaney that it should be falsely represented and they did so falsely represent to the persons whose names are hereinbefore mentioned, and to the public in general, that the money invested by the investors in the said Standard Oil Promotion and Investment Company, was and would be always and at all times safe; that the said investors and each and all of them, might withdraw the entire amount of their investments after ninety days, together with all profits, by giving thirty days' notice in writing to the said Standard Oil Promotion and Investment Company.

And it was further devised by and between the said William Baer Ewing and George B. Chaney, that each and all of the said representations aforesaid, should be made and they were so made to the said Charles F. Dosch, Mary Hanson, and Annie Guthrie, and to each of them, and to certain other persons whose names are to the Grand Jurors aforesaid unknown, and that said scheme should be entered into and carried out, and it was so entered into and carried out by the said William Baer Ewing and George B. Chaney, with the intent and for the purpose of inducing the persons aforesaid and each of them and said other persons whose names are to the Grand Jurors aforesaid unknown, and any other persons who might be induced to enter into correspondence with the said William Baer Ewing and George B. Chaney, to give to them, the said William Baer Ewing and George B. Chaney, and to the said Standard Oil Promotion and Investment Company, certain property, goods and money

of the various persons aforesaid, and each of them, and of the other persons who might be induced to enter into correspondence with the said William Baer Ewing and George B. Chaney.

And said representations agreed by them to be made as aforesaid, were made by the said William Baer Ewing and George B. Chaney, to the persons aforesaid, and to the public in general, by means of oral statements, newspaper advertisements, letters, prospectuses and publications, and said representations so made as aforesaid, and each and all of them, was and were utterly false and untrue in fact, and said representations and each and all of them was and were well known by the said William Baer Ewing and George B. Chaney to be utterly false and untrue in fact, at the time they were so made as aforesaid; and said representations were made solely for the purpose of obtaining money, goods and property of the said persons whom they might induce to enter into correspondence with them.

That by reason of said false representations, so made by the said William Baer Ewing and George B. Chaney, as aforesaid, the said Charles F. Dosch, was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of five hundred dollars, in lawful money of the United States of America, and the said Mary Hanson was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain moneys, goods and property of the value of five hundred dollars, lawful money of the United States of America, and the said

Annie Guthrie was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of four hundred dollars, in lawful money of the United States of America.

And the Grand Jurors aforesaid, on their oath aforesaid, do say, that in order to carry out and effect said scheme and artifice to defraud and in furtherance thereof, and in and for executing the same and attempting to do so, the said William Baer Ewing and George B. Chaney, on the third day of June in the year of our Lord one thousand nine hundred and one, at the city and county of San Francisco, in the State and Northern District of California, then and there being, did then and there wilfully, unlawfully and knowingly place and caused to be placed in the postoffice of the said United States, at the city and county of San Francisco, in the State and district aforesaid, to be sent and delivered by the said postoffice establishment of the United States, a certain letter, enclosed in a sealed envelope, duly stamped with a postage stamp of the United States of the denomination of two cents, and addressed to "Mr. Chas. F. Dosch, 611 K. St., Sacramento, Calif.," and which said letter was in the words and figures as follows, to wit:

"Long Distance Phone South 761. Cable Address 'Sopic.'

STANDARD OIL PROMOTION AND INVESTMENT CO., Incorporated.

Authorized Capital, $5,000,000.

Subscribed Capital, $2,500,000.

Depositories:
First National Bank,
Western National Bank,
Germania Trust Company.

Licensed by the United States Government.
575, 576, 577 Parrott Building.
San Francisco, U. S. A., June 1st, 1901.

Mr. Chas. F. Dosch, Sacramento, Calif.

Dear Sir: We earned for our certificate holders during the month of May, 10¼% profit on every dollar invested. Several transactions which we had hoped to close were carried over into the June accounts and we are now in a position to confidentially assure you that the June dividend will greatly exceed the one declared today.

Therefore, acting for your personal interest and advantage, we have added the profits, amounting to $41, to your investment, which will increase the earning capacity and yield a large dividend for June operations.

Our holdings are greatly increasing in value from day to day, especially those in the Texas oil fields, and our earnings for the coming six months will be larger than any paid in the past.

During the past year our predictions have been correct in every instance and the present opportunity warrants you increasing your investment to that amount which you feel able.

We never advise our certificate holders unless we are sure of the results, and this letter is written to you confidentially, as it is strictly inside information. Therefore we assure you that the above will be to your interest, financially, if taken advantage of at once.

Yours very truly,

STANDARD OIL PROMOTION AND INVESTMENT CO.,

WILLIAM B. EWING,
Secretary and Treasurer.

WBE-MF Steno-1.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present: That,

WILLIAM BAER EWING and GEORGE B. CHANEY, late of the Northern District of California, heretofore, to wit, on the thirty-first day of December, in the year of our Lord one thousand nine hundred, at the city and county of San Francisco, in the State and Northern District of California, then and there being, did then and there devise a scheme to defraud Charles F. Dosch,

Mary Hanson, Annie Guthrie, and certain other persons whose names are to the Grand Jurors aforesaid unknown, but who were then and there, at the several times of the correspondence hereinafter referred to residents of the United States of America; which said scheme to defraud was to be effected by opening correspondence and communication with such persons, and by distributing advertisements, circulars, prospectuses and letters by means of the postoffice establishment of the United States, and by inciting such persons to open a correspondence through such postoffice establishment, with them, the said William Baer Ewing and George B. Chaney, concerning said scheme, and which said scheme was then and there as follows, to wit:

That on the thirty-first day of December, one thousand nine hundred, the said William Baer Ewing and George B. Chaney devised that they should organize and conduct together, and they did so organize and conduct together, a corporation under the laws of the State of California, to be called and styled the "Standard Oil Promotion and Investment Company"; that it was then and there devised by the said William Baer Ewing and George B. Chaney, that the said George B. Chaney should be held out, and he was held out to be the vice-president, and the said William Baer Ewing should be held out, and he was held out to be the secretary and treasurer of the said Standard Oil Promotion and Investment Company.

That it was further devised by and between the said

William Baer Ewing and George B. Chaney, that it should be claimed and represented, and they did so claim and represent to the persons whose names are hereinbefore mentioned and to the public in general that the said Standard Oil Promotion and Investment Company had an authorized capital stock of $5,000,000; and that said company had a subscribed capital stock of $2,500,000, and that said Standard Oil Promotion and Investment Company had funds on deposit in the First National Bank, in the Western National Bank and in the Germania Trust Company, and that said Standard Oil Promotion and Investment Company was licensed by the United States Government, and that said company was organized for the purpose of promoting generally the oil industry of the Pacific Coast; that said Standard Oil Promotion and Investment Company promoted and organized and would promote and organize oil companies on a strictly first-class basis, and that said Standard Oil Promotion and Investment Company acted and would act as the general representatives of such oil companies, taking full charge of the sale of stock and general development of their lands; that the said Standard Oil Promotion and Investment Company, financed and would finance incorporated oil companies of from $100,000 to $5,000,000 capitalization and put them on a paying basis.

That it was further devised by the said William Baer Ewing and George B. Chaney, that they should falsely represent to the persons whose names are hereinbefore

mentioned, and to the public in general, that the said Standard Oil Promotion and Investment Company, was transacting and would transact a co-operative investment business in oil stocks and properties, and was giving and would give to the investor of limited means the same great opportunities enjoyed by the "Kings of Finance" and "Market Leaders"; that the investments of all the investors in the said Standard Oil Promotion and Investment Company were and would be included in transactions representing thousands of dollars, and that said investors were receiving and would receive pro rata shares of the profits of their investments every thirty days, as the said profits were or thereafter should be earned; that a complete statement together with a check for all profits earned was and would be sent to all investors at the end of each month, and that the only charge which was or would be made by the said Standard Oil Promotion and Investment Company, for its services to said investors, was and would be twenty per cent of the profits of the said investors on their said investments.

That it was further devised by and between the said William Baer Ewing and George B. Chaney, that it should be falsely represented and they did so falsely represent to the persons whose names are hereinbefore mentioned, and to the public in general, that the said William Baar Ewing and George B. Chaney, the secretary and treasurer and vice-president, respectively, of said Standard Oil Promotion and Investment Company, as hereinbefore set forth, had made, and each

of them had made, a lifelong study of oil throughout the United States, and especially the oil fields of California; that the judgment of the said William Baer Ewing and George B. Chaney, based on many years' experience, would earn thousands of dollars for those who should follow the advice of the said William Baer Ewing and George B. Chaney in all matters pertaining to oil; that the said Standard Oil Promotion and Investment Company was investing and would invest only in first-class stocks and properties which they, the said William Baer Ewing and George B. Chaney had thoroughly investigated and knew to be desirable in every particular; that the said Standard Oil Promotion and Investment Company had been and was represented in every oil producing district of California and Texas, and that the operations of the said Standard Oil Promotion and Investment Company in the new Texas fields would make the earnings of the investors in the said Standard Oil Promotion and Investment Company, even greater than they had ever been before.

That it was further devised by and between the said William Baer Ewing and George B. Chaney that it should be falsely represented and they did so falsely represent to the persons whose names are hereinbefore mentioned and to the public in general, that the money invested by the investors in the said Standard Oil Promotion and Investment Company, was and would be always and at all times safe; and that the said investors and each and all of them, might withdraw the entire amount of their investments after ninety days, together

with all profits, by giving thirty days' notice in writing to the said Standard Oil Promotion and Investment Company.

And it was further devised by and between the said William Baer Ewing and George B. Chaney, that each and all of the said representations aforesaid, should be made and they were so made to the said Charles F. Dosch, Mary Hanson and Annie Guthrie, and to each of them, and to certain other persons whose names are to the Grand Jurors aforesaid unknown, and that the said scheme should be entered into and carried out, and it was so entered into and carried out by the said William Baer Ewing and George B. Chaney, with the intent and for the purpose of inducing the persons aforesaid and each of them, and said other persons whose names are to the Grand Jurors aforesaid unknown, and any other persons who might be induced to enter into correspondence with the said William Baer Ewing and George B. Chaney, to give to them, the said William Baer Ewing and George B. Chaney, and to the said Standard Oil Promotion and Investment Company, certain property, goods and money of the various persons aforesaid, and each of them, and of the other persons who might be induced to enter into correspondence with the said William Baer Ewing and George B. Chaney.

And said representations agreed by them to be made as aforesaid, were made by the said William Baer Ewing and George B. Chaney, to the persons aforesaid, and to the public in general, by means of oral state-

ments, newspaper advertisements, letters, prospectuses and publications; and said representations, so made as aforesaid, and each and all of them, was and were utterly false and untrue in fact, and said representations and each and all of them, was and were well known by the said William Baer Ewing and George B. Chaney to be utterly false and untrue in fact, at the time they were so made as aforesaid; and said representations were made solely for the purpose of obtaining money, goods and property of the said persons whom they might induce to enter into correspondence with them.

That by reason of said false representations, so made by the said William Baer Ewing and George B. Chaney, as aforesaid, the said Charles F. Dosch, was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of five hundred dollars, in lawful money of the United States of America, and the said Mary Hanson was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of five hundred dollars, lawful money of the United States of America, and the said Annie Guthrie was induced to give and did give to the said William Baer Ewing and

George B. Chaney, certain money, goods and property of the value of four hundred dollars, in lawful money of the United States of America.

And the Grand Jurors aforesaid, on their oath aforesaid, do say, that in order to carry out and effect said scheme to defraud and in furtherance thereof, and in and for executing the same and attempting to do so, the said William Baer Ewing and George B. Chaney, on the third day of June, in the year one thousand nine hundred and one, at the city and county of San Francisco, in the State and Northern District of California, then and there being, did then and there willfully, unlawfully and knowingly place and cause to be placed in the postoffice of the said United States, at the said city and county of San Francisco, in the State and District aforesaid, to be sent and delivered by the said postoffice establishment of the United States, a certain letter, enclosed in a sealed envelope, duly stamped with a postage stamp of the United States of the denomination of two cents, and addressed to "Mrs. Mary Hanson, Broderick, Calif.," and which said letter was in the words and figures as follows, to wit:

Long Distance Phone South 761. Cable Address Sopic.

STANDARD OIL PROMOTION AND INVESTMENT CO.,

Incorporated.

Authorized Capital $5,000,000.

Subscribed Capital $2,500,000.

Depositories:

First National Bank, Western National Bank,
Germania Trust Company.

Licensed by the United States Government.

575, 576, 577 Parrott Building,

San Francisco, U. S. A., June 1st, 1901.

Mrs. Mary Hanson, Broderick, Calif.

Dear Madam. We earned for our certificate holders during the month of May, 10-1/4% profit on every dollar invested. Several transactions which we had hoped to close were carried over into the June accounts and we are now in a position to confidentially assure you that the June dividend will greatly exceed the one declared to-day.

Therefore, acting for your personal interest and advantage, we have added the profits, amounting to $41, to your investment, which will increase the earning capacity and yield a large dividend for June operations.

Our holdings are greatly increasing in value from day to day, especially those in the Texas oil fields, and our earnings for the coming six months will be larger than any paid in the past.

During the past year our predictions have been correct in every instance and the present opportunity warrants you increasing your investment to that amount which you feel able.

We never advise our certificate holders unless we are sure of the results, and this letter is written to you confidentially as it is strictly inside information. Therefore we assure you that the above will be to your interest financially, if taken advantage of at once.

Very truly yours,

STANDARD OIL PROMOTION AND INVESTMENT CO.,

WILLIAM B. EWING,
Secretary and Treasurer.

WBE-BG.
Sten-5.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided.

THIRD COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present: That

WILLIAM BAER EWING and GEORGE B. CHANEY.

late of the Northern District of California, heretofore, to wit, on the thirty-first day of December, in the year of our Lord one thousand nine hundred, at the city and county of San Francisco, in the State and Northern District of California, then and there being, did then and

there devise a scheme to defraud Charles F. Dosch, Mary Hanson, Annie Guthrie, and certain other persons whose names are to the Grand Jurors aforesaid unknown, but who were then and there at the several times of the correspondence hereinafter referred to, residents of the United States of America; which said scheme to defraud was to be effected by opening correspondence and communication with such persons, and by distributing advertisements, circulars, prospectuses and letters by means of the postoffice establishment of the United States, and by inciting such persons to open a correspondence through such postoffice establishment, with them, the said William Baer Ewing and George B. Chaney, concerning said scheme, and which said scheme was then and there as follows, to wit:

That on the thirty-first day of December, one thousand nine hundred, the said William Baer Ewing and George B. Chaney devised that they should organize and conduct together a corporation under the laws of the State of California, to be called and styled the "Standard Oil Promotion and Investment Company"; that it was then and there devised by the said William Baer Ewing and George B. Chaney, that the said George B. Chaney should be held out, and he was held out to be the vice-president, and the said William Baer Ewing should be held out, and he was held out to be the secretary and treasurer of the said Standard Oil Promotion and Investment Company.

That it was further devised by and between the said

William Baer Ewing and George B. Chaney, that it should be claimed and represented, and they did so claim and represent to the persons whose names are hereinbefore mentioned, and to the public in general, that the said Standard Oil Promotion and Investment Company had an authorized capital stock of $5,000,000; and that said Company had a subscribed capital stock of $2,500,000, and that said Standard Oil Promotion and Investment Company had funds on deposit in the First National Bank, in the Western National Bank and in the Germania Trust Company, and that said Standard Oil Promotion and Investment Company was licensed by the United States Government, and that said company was organized for the purpose of promoting generally the oil industry of the Pacific Coast; that said Standard Oil Promotion and Investment Company promoted and organized, and would promote and organize oil companies on a strictly first-class basis, and that said Standard Oil Promotion and Investment Company acted and would act as the general representatives of such oil companies, taking full charge of the sale of stock and general development of their lands; that the said Standard Oil Promotion and Investment Company financed and would finance incorporated oil companies of from $100,000 to $5,000,000 capitalization and put them on a paying basis.

That it was further devised by the said William Baer Ewing and George B. Chaney, that they should falsely represent, and they did so falsely represent to the persons whose names are hereinbefore mentioned, and to the pub-

lic in general, that the Standard Oil and Promotion and Investment Company was transacting and would transact a co-operative investment business in oil stocks and properties, and was giving and would give to the investor of limited means the same great opportunities enjoyed by the "Kings of Finance" and "Market Leaders"; that the investments of all of the investors in the said Standard Oil Promotion and Investment Company were and would be included in transactions representing thousands of dollars, and that said investors were receiving and would receive pro rata shares of the profits of their said investments every thirty days, as the said profits were or thereafter should be earned; that a complete statement, together with a check for all profits earned was and would be sent to all investors at the end of each month, and that the only charge which was or would be made by the said Standard Oil Promotion and Investment Company for its services to said investors, was and would be twenty per cent of the profits of the said investors on their said investments.

That it was further devised by and between the said William Baer Ewing and George B. Chaney, that it should be falsely represented, and they did so falsely represent, to the persons whose names are hereinbefore mentioned, and to the public in general, that the said William Baer Ewing and George B. Chaney, the secretary and treasurer and vice-president, respectively, of the said Standard Oil Promotion and Investment Company, as hereinbefore set forth, had made, and each of them had made, a lifelong study of oil throughout the United

States, and especially the oil fields of California; that the judgment of the said William Baer Ewing and George B. Chaney, based on many years' experience, would earn thousands of dollars for those who should follow the advice of the said William Baer Ewing and George B. Chaney in all matters pertaining to oil; that the said Standard Oil Promotion and Investment Company was investing, and would invest only in first-class stocks and properties which they, the said William Baer Ewing and George B. Chaney, had thoroughly investigated and knew to be desirable in every particular; that the said Standard Oil Promotion and Investment Company had been and was represented in every oil-producing district of California and Texas, and that the operations of the said Standard Oil Promotion and Investment Company in the new Texas fields would make the earnings of the investors in the said Standard Oil Promotion and Investment Company even greater than they had ever been before.

That it was further devised by and between the said William Baer Ewing and George B. Chaney that it should be falsely represented and they did so falsely represent to the persons whose names are hereinbefore mentioned and to the public in general, that the money invested by the investors in the said Standard Oil Promotion and Investment Company, was and would be always and at all times safe; that the said investors and each and all of them, might withdraw the entire amount of their investments after ninety days, together with all profits, by giving thirty days' notice in writing to the said Standard Oil

Promotion and Investment Company. And it was further devised by and between the said William Baer Ewing and George B. Chaney, that each and all of the said representations aforesaid, should be made and they were so made to the said Charles F. Dosch, Mary Hanson, and Annie Guthrie, and to each of them, and to certain other persons whose names are to the Grand Jurors aforesaid unknown, and that said scheme should be entered into and carried out by the said William Baer Ewing and George B. Chaney, and it was so entered into and carried out by the said William Baer Ewing and George B. Chaney, with the intent and for the purpose of inducing the persons aforesaid and each of them, and said other persons whose names are to the Grand Jurors aforesaid unknown, and any other persons who might be induced to enter into correspondence with the said William Baer Ewing and George B. Chaney, to give to them, the said William Baer Ewing and George B. Chaney, and to the said Standard Oil Promotion and Investment Company, certain property, goods and money of the various persons aforesaid, and of each of them, and of the other persons who might be induced to enter into correspondence with the said William Baer Ewing and George B. Chaney.

And said representations agreed by them to be made as aforesaid, were made by the said William Baer Ewing and George B. Chaney, to the persons aforesaid, and to the public in general, by means of oral statements, newspaper advertisements, letters, prospectuses and publications; and said representations so made as aforesaid, and

each and all of them, was and were utterly false and untrue in fact, and said representations and each and all of them was and were well known by the said William Baer Ewing and George B. Chaney to be utterly false and untrue in fact, at the time they were so made as aforesaid; and said representations were made solely for the purpose of obtaining money, goods and property of the said persons who they might induce to enter into correspondence with them.

That by reason of said false representations, so made by the said William Baer Ewing and George B. Chaney, as aforesaid, the said Charles F. Dosch was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of five hundred dollars, in lawful money of the United States of America, and the said Mary Hanson was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of five hundred dollars, lawful money of the United States of America, and the said Annie Guthrie was induced to give and did give to the said William Baer Ewing and George B. Chaney, certain money, goods and property of the value of four hundred dollars, in lawful money of the United States of America.

And the Grand Jurors aforesaid, on their oath aforesaid, do say, that in order to carry out and effect said scheme and artifice to defraud and in furtherance thereof, and in and for executing the same and attempting to

do so, the said William Baer Ewing and George B. Chaney, on the seventh day of May in the year of our Lord one thousand nine hundred and one, at the city and county of San Francisco, in the State and Northern District of California, then and there being, did then and there willfully, unlawfully and knowingly place and cause to be placed in the postoffice of the said United States, at the said city and county of San Francisco, in the State and district aforesaid, to be sent and delivered by the said postoffice establishment of the United States, a certain letter and printed pamphlet, enclosed in a sealed envelope, duly stamped with a postage stamp of the United States of the denomination of two cents, and addressed to "Mrs. Annie Guthrie, 2113 N St., Sacramento, Cal.," and which said letter was in the words and figures as follows, to wit:

"Long Distance 'Phone, South, 761. Cable Address, 'Sopic.'

STANDARD OIL PROMOTION AND INVESTMENT COMPANY (Incorporated).

Authorized Capital, $5,000,000.

Subscribed Capital, $2,500,000.

Depositories:

First National Bank, Western National Bank, Germania Trust Company.

Licensed by the United States Government.

575, 576, 577 Parrott Building,

San Francisco, U. S. A., May 6, 1901.

Mrs. Annie Guthrie, Sacramento, Cal.

Dear Madam: Do you want to acquire some of the

wealth that is being produced in the California and Texas oil fields?

The following personal letter together with the inclosed prospectus will explain to you an extremely profitable and absolutely safe method of investment that will earn substantial profits monthly without any chance of loss to the original capital invested. We have never earned less than 3% a month for our certificate holders and many investors have made their first successful investment through this company.

Our method is strictly co-operative, which is the only plan which gives to the investor of limited means the same great opportunities enjoyed by the capitalist with millions at his command, and as we operate only in gilt-edge oil stocks and properties that have been thoroughly investigated by our experts, our certificate holders are at all times protected from a possible loss.

Your investment is included in transactions representing thousands of dollars and you receive a pro rata share of the profits every thirty days, as earned. A complete statement, together with a check for all profits earned is sent to you at the end of each month, our only charge for services is 20% of the profits.

Your money is always absolutely safe and may be withdrawn at any time as explained in the inclosed prospectus, and considering the safety of the investment and the immense profits that are being made in oil it will be to your personal advantage to give this matter your immediate attention.

We are well represented in every oil producing dis-

trict of California and Texas and our operations in the new Texas fields will make the earnings even greater than they have ever been before.

Mr. A. M. Aubertus of 810 Seventh Street, Sacramento, is our special representative of whom you can secure all further information.

Trusting that you will act upon this letter as your best judgment and personal interest dictates and awaiting an early reply, we remain,

Yours very truly,

STANDARD OIL PROMOTION AND INVESTMENT CO.,

WILLIAM B. EWING,
Secretary and Treasurer."

WBE—DC.
Steno—4

And which said printed pamphlet was in the words and figures as follows, to wit:

On the front cover of said pamphlet were the printed words in gilt letters "Standard Oil Promotion and Investment Company," and on the back cover of said pamphlet were the printed words in gilt letters "Depositories—First National Bank, Western National Bank, References, California Petroleum Miners' Association, Mining and Engineering Review, Pacific Oil Reporter, San Francisco."

And on the first page of the front flyleaf of said pamphlet were the printed words, "Standard Oil Promotion and Investment Company of San Francisco, U. S. A., 575, 576, 577 Parrott Building. Capital, $5,000,000.00. Incor-

porated under the laws of California. Licensed by United States Government. Investors, Promoters and Financiers of Oil Stock, Properties and Companies."

And on the opposite page of said front flyleaf of said pamphlet were the printed words, "Officers: Luther J. Robling, President. George B. Chaney, Vice-President. William B. Ewing, Sec'y and Treas. Directors: Luther J. Robling, Andrew A. Snyder, Benj. Hewitt Lummis, William B. Ewing, George B. Chaney. Attorneys: Hilton & McKinlay. Reliable experts throughout the California Oil Belts."

And on the back flyleaf of which said pamphlet were the printed words, "Address all communications to Standard Oil Promotion and Investment Company 575, 576, 577 Parrott Bldg., San Francisco, California."

And the body of which said pamphlet was in the words and figures as follows, to wit:

"General Features: The Standard Oil Promotion and Investment Co., was organized for the purpose of promoting, generally, the oil industry of the Pacific Coast. We promote and organize oil companies on a strictly first-class basis, and act as their general representatives, taking full charge of the sale of stock and general development of their lands. We finance incorporated oil companies of from $100,000 to $5,000,000 capitalization, and put them on a paying basis. We have made a lifelong study of oil throughout the United States and especially the oil fields of California, and our judgment, based on many years' experience, will earn thousands of dollars

for those who follow our advice on all matters pertaining to oil.

We transact a co-operative investment business in oil stocks and properties and give to the investor of limited means the same great opportunities enjoyed by the 'Kings of Finance' and 'Market Leaders.' We take the small sums of thousands of investors and form them into one gigantic fund which gives us a tremendous power in our operations. In a word, we open to the investor of limited means the same great opportunities of making money hitherto enjoyed only by the investor with thousands of dollars at his command.

Points to Consider: There is probably but little more to be said of the California oil fields than that already chronicled in the press throughout the United States. While many men have become immensely wealthy through successful investment and operations in oil, others have lost the savings of a lifetime—money that was earned by years of toil. Companies have been organized whose only intent was to sell their worthless stock for hard-earned coin. The California oil industry, while yet in its infancy, has given birth to many such companies, and thousands upon thousands of shares of worthless stock, not worth the paper on which it was written, have been sold to a credulous public who receive nothing but broken promises for their money.

There are many good oil companies, but to detect the good from the bad require minute investigation, the best judgment and long experience. We invest only in first-class stocks and properties which we have thoroughly

investigated and know to be desirable in every particular. There are fortunes yet to be made in the California oil industry, and our method will bring you dollars, while others give you nothing but promises and prospects.

Co-operative Investment: The investment department of the Standard Oil Promotion and Investment Company is operated strictly upon the co-operative system. This is the only plan that gives to the investor with limited means the same power and opportunities of the man with millions at his command. Co-operation is the father of equality. Twenty-five dollars invested co-operatively has the same proportionate earning capacity that $25,000 has. Co-operation increases the strength of capital just as it increases the strength of an army, it increases the power to earn as it lessens the chance of loss; it increases the profits proportionately, to the increase of working capital. If one hundred men with $25 each put their money in one pool they have $2,500 to work with instead of each working with $25. They increase their strength and power one hundred times—that is co-operation. 'In union there is strength,' and in co-operation lies the secret of our success. We have many transactions where $1,000 would be of no possible advantage, while in the same deal $10,000 would reap a handsome profit. If you invest but $25 with us you will earn the same profits, proportionately, that the investor with $2,500 earns.

Profits Paid as Earned: The profits on your investment will, of course, depend largely upon our amount of working capital, and we do not presume to say just what profit we will earn for you from month to month. It is

predicted that the ensuing six months will witness greater activity in California oil than has ever been known. We will see a reign of prosperity that will surprise the most imaginative dreamers, and with our experience and many advantages we look forward to a run of profits that will satisfy beyond all expectations. You are always informed just what your investment is earning, as we send you a statement, showing the exact standing of your account every thirty days, together with a check for all profits earned. We retain 20 per cent of the profits in full for our services; no other charge whatsoever. Our system is thoroughly and entirely mutual; your gain is our gain. If you so desire, you may reinvest the profits by adding them to the original investment, thereby increasing the earning capacity and making the monthly profits proportionately greater. While the investment is at our discretion, it is always under your immediate direction.

Subject to Withdrawal: The one great disadvantage and drawback to most investments is the fact that your money is always tied up where you cannot get it. This feature is entirely eliminated from our method. You may withdraw the entire amount of your investment after ninety days, together with all profits, by giving thirty days' notice in writing, to the company. In other words, you can always realize upon your investment whenever you may require the money. This feature guarantees to you absolute safety as you know you can draw your money just when you want it. This feature always gives you the convenience and accom-

modation of a savings bank, while at the same time your money is continually active and earning large profits (which are placed to your credit) from month to month. You know at the end of every thirty days just what your investment has earned. No banking institution or investment company on record can offer you more liberal opportunities than those of the Standard Oil Promotion and Investment Company and surely there is no method of investment where a small amount of money will earn larger profits and assure you the absolute safety combined in our co-operative plan.

Mutual and Secure: It requires the same amount of detailed work to handle a small investment that it does to handle one well up in millions. But we have thoroughly equipped ourselves with every facility for handling the accounts of thousands of investors and will therefore, give precisely the same attention to all accounts, large and small. Amounts will be received for investment form $25 to $5,000. The company will issue for each investment a receipt or certificate of deposit in accordance with the plan described in this book. All investors will be treated alike and shall each receive a pro rata share of the profits earned for each month's transactions.

It is not necessary to invest a large amount to derive the benefits of our system. Co-operation creates all things equal. Twenty-five dollars is the smallest sum we receive, but ninety days of active operations may increase the sum four times the amount of the original

investment. Remember our plan is entirely mutual and every dollar we earn for you means a profit for us. No matter what the profits amount to, the original investment is always secure. We offer you a safe and profitable method of investment that will yield large returns without impairing the money invested."

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided.

MARSHALL B. WOODWORTH,
United States Attorney.

The following named witnesses testified before the Grand Jury, viz.: Mrs. Annie Guthrie, Chas. F. Dosch, A. M. Aubertus, Mrs. Mary Hanson, Lorin H. Bricker.

[Endorsed]: A True Bill. Fredk. W. Zeile, Foreman Grand Jury. Presented in Open Court and Filed Decr. 31, 1902. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Thursday, the 14th day of January, A. D. 1903. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Number and Title of Case.]

Plea.

In this case, the defendant with Frank McGowan, his attorney, being present in open court—on motion of Edward J. Banning, Assistant United States Attorney, the defendant Ewing was called upon to plead herein, and thereupon the defendant Ewing entered a plea of not guilty to the indictment on file herein. By agreement of the attorneys for the respective parties, it is ordered that the case be continued until Saturday, January 17th, 1903, on which day the date of the trial hereof will be set.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM BAIR EWING and GEORGE B. CHANEY,
Defendants.

Objections to Indictment.

And now comes the said William Bair Ewing and objects to the introduction of any evidence in this cause for the reason and upon the grounds:

1st.

That the first count of the indictment does not contain or state facts sufficient to constitute a public offense in this:

(a) It does not appear from said count or from said indictment by whom "the said William Baer Ewing should be held out," or by whom "he was held out to be secretary and treasurer of said Standard Oil Promotion and Investment Company."

(b) That there is no allegation in said count to show or aver that the said Charles F. Dosch relied on or believed in any of the representations alleged in said count in giving to said defendants the said sum of five hundred dollars mentioned therein.

(c) That there is no allegation in said count to show or aver that the said Mary Hanson, named therein, relied on or believed in any of the representations alleged in said count in giving to defendants the said sum of five hundred dollars mentioned therein.

(d) That there is no allegation in said count to show or aver that Annie Guthrie, named therein, relied on or believed in any of the representations alleged in said count in giving to said defendants the said sum of four hundred dollars mentioned therein.

(e) There is a failure to allege in said count an essential element of the alleged offense, to wit, the said count does not allege, state or aver that there was, at any of the time or times named or designated in said count, an or any intent upon the part of the defendants, or either of them, to use the mails of the United States Government to defraud, or to further, carry out or promote the alleged fraudulent scheme or any unlawful, illegal or any intent or purpose whatever.

(f) There is no allegation in said count to show that the representations and statements, or either of them, alleged to have been represented and stated in said count by said defendants were represented or stated with an intent to deceive, mislead or defraud the persons named, to wit, Charles Dosch, Mary Hanson and Annie Guthrie, or that said representations were made with an illegal or unlawful or any intent to use the mails of the United States Government.

(g) There is no allegation in said count to show or aver that at any of the time or times mentioned therein

there was an intent on the part of said defendants, or either of them, to defraud any person through or by the agency of the mails of the United States Government, or that any matter or thing alleged or set forth in said count was done or represented by defendants, or either of them, with any such, or any intent whatever.

(h) There is no allegation in said count to show or aver that the defendants, or either of them, intended to effect the scheme mentioned and described therein by opening or intending to open correspondence with the persons named in said count, or with other persons to the Grand Jury unknown.

(i) It is not directly alleged in said count, nor does it appear therein, or therefrom, that the alleged scheme to defraud included or contemplated a use or abuse of the mails or the postoffice establishment of the United States.

(j) The said first count of said indictment is defective, in that it does not allege any intent upon the part of defendants, or either of them, to use or employ said United States mails as a part of said alleged fraudulent scheme.

(k) The said first count in said indictment is defective, in this: it is not alleged or charged therein that it was a part of the alleged fraudulent scheme that it should be effected by opening or inciting to correspondence by means of the postal establishment of the United States.

2d.

That the second count in said indictment does not

contain or state facts sufficient to constitute a public offense in this:

(a) It does not appear from said count by whom the said George B. Chaney should be held out, or by whom he was held out, as vice-president, or by whom the said William Bair Ewing should be held out, or by whom he was held out, to be the secretary and treasurer of the Standard Oil Promotion and Investment Company.

(b) There is no allegation in said count that either of said defendants ever falsely or otherwise represented to any person or persons any of the matters or things set forth on page ten of said indictment, between lines 4 and 26 thereof.

(c) There is no allegation in said count that any of the matters and things alleged and set forth as represented by said defendants were known to be, or were believed to be, false or untrue by said Charles F. Dosch, Mary Hanson and Annie Guthrie, or that either of the persons last named did not know the same to be false and untrue.

(d) There is no allegation in said second count to show or aver that Charles F. Dosch, Mary Hanson and Annie Guthrie, or either of them, relied upon or believed in any of the alleged representations or assertions alleged in the second count as represented by said defendants in giving the said several sums of money alleged to have been given by said persons last named.

(e) There is a failure to allege in said count an essential element of the alleged offense, to wit, the said

count does not allege, state or aver that there was at any of the time or times named or designated in said count an or any intent upon the part of defendants, or either of them, to use the mails of the United States Government to defraud, or to further, carry out or promote the alleged fraudulent scheme or any unlawful, illegal, or any intent or purpose whatever.

(f) There is no allegation in said count to show that the representations and statements, or either of them, alleged to have been represented and stated in said count by said defendants, were represented or stated with an intent to deceive, mislead or defraud the persons named, to wit, Charles Dosch, Mary Hanson and Annie Guthrie, or that said representations were made with an illegal or unlawful or any intent to use the mails of the United States Government.

(g) There is no allegation in said count to show or aver that at any of the time or times mentioned therein there was an intent on the part of the said defendants, or either of them, to defraud any person through or by the agency of the mails of the United States Government, or that any matter or thing alleged or set forth in said count was done or represented by defendants, or either of them, with any such, or any intent whatever.

(h) There is no allegation in said count to show or aver that the defendants or either of them intended to effect the scheme mentioned and described therein by opening or intending to open correspondence with the

persons named in said count, or with other persons to the Grand Jury unknown.

(i) It is not directly alleged in said count, nor does it appear therein or therefrom, that the alleged scheme to defraud included or contemplated a use or abuse of the mails or the postoffice establishment of the United States.

(j) The said second count of said indictment is defective in that it does not allege any intent upon the part of defendants, or either of them, to use or employ said United States mails as a part of said alleged scheme to defraud.

(k) The second count of said indictment is defective in this: It is not alleged or charge therein that it was a part of the alleged scheme to defraud that it should be effected by opening or inciting to correspondence by means of the postal establishment of the United States.

3d.

That the third count of said indictment does not state or allege facts sufficient to constitute a public offense in this:

(a) There is no allegation in said count to show by whom defendant Chaney, and defendant Ewing should be held out, or by whom they were ever held out to be respectively vice-president and secretary and treasurer, of the said Standard Oil Promotion and Investment Company.

(b) It does not appear from said third count by whom it should be claimed or represented that the said

Standard Oil Promotion and Investment Company has an authorized capital stock of $5,000,000.00.

(c) There is no allegation in said count to show that Charles F. Dosch, Mary Hanson and Annie Guthrie did not know that the alleged representations were untrue or false.

(d) There is no allegaton in said count to show or aver that Charles F. Dosch, Mary Hanson and Annie Guthrie believed in or relied upon any of the representations set forth in said count in giving to defendants or said Standard Oil Promotion and Investment Company the various sums of money mentioned therein, or at any time or at all.

(e) There is a failure to allege in said count an essential element of the alleged offense, to wit, the said count does not allege, state or aver that there was at any of the time or times named or designated in said count an or any intent upon the part of the defendants, or either of them, to use the mails of the United States Government to defraud, or to further carry out or promote the alleged fraudulent scheme, or any unlawful, illegal or any intent or purpose whatever.

(f) There is no allegation in said count to show that the representations and statements, or either of them, alleged to have been represented and stated in said count by said defendants were represented or stated with an intent to deceive, mislead or defraud the persons named, to wit, Charles F. Dosch, Mary Hanson and Annie Guthrie, or that the said representations were

made with an illegal or unlawful or any intent to use the mails of the United States Government.

(g) There is no allegation in said count to show or aver that at any of the time or times mentioned therein there was an intent on the part of said defendants, or either of them, to defraud any person through or by the agency of the mails of the United States Government, or that any matter or thing alleged or set forth in said count was done or represented by defendants, or either of them, with any such, or any intent whatever.

(h) There is no allegation in said count to show or aver that the defendants, or either of them, intended to effect the scheme mentioned and described therein by opening or intending to open correspondence with the persons named in said count, or with any other persons to the Grand Jury unknown.

(i) It is not directly alleged in said count, nor does it appear therein or therefrom, that the alleged scheme to defraud included or contemplated a use or abuse of the mails or the postoffice establishment of the United States.

(j) The said third count of said indictment is defective in this, that it is not alleged or charged therein that it was a part of the alleged scheme to defraud that it should be effected by opening or inciting to correspondence by means of the postal establishment of the United States.

[Endorsed]: Filed Feb. 1, 1904. George E. Morse, Clerk. By John Fouga, Deputy Clerk.

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 1st day of February, A. D. 1904. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Number and Title of Case.]

Order Overruling Objections to Indictment.

* * * * * * * *

Mr. McKinley stated the case of the Government to the Court and jury. Mr. McGowan then read and filed objections to the indictment, which objections were by order of the Court overruled, to which order Mr. McGowan excepted.

* * * * * * * *

In the District Court of the United States, Northern District of California.

THE UNITED STATES OF AMERICA,
vs.
W. B. EWING, et al.
} No. 4065.

Verdict.

We, the jury, find W. B. Ewing, the prisoner at the bar, guilty as charged.

P. I. JOYCE,
Foreman.

[Endorsed]: Filed February 3d, 1904, at 11 o'clock and 35 minutes A. M. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
WILLIAM BAER EWING and GEORGE B. CHANEY, Defendants.

Motion of Defendant William Baer Ewing for a New Trial.

And now comes the said defendant, William Baer Ewing, and moves this Court at this time to vacate, annul, and set aside the verdict of the jury heretofore rendered against said defendant, and to grant him a new trial and a rehearing of this cause, upon the grounds:

1st.

That the said Court misdirected the jury in matters of law occurring at the trial.

2d.

That the said Court erred in the decision of questions of law arising during the course of the trial.

3d.

That the verdict is contrary to law.

4th.

That the verdict above named is contrary to the evidence.

5th.

That the indictment in this cause does not state facts sufficient to constitute a public offense.

FRANK McGOWAN,
Attorney for Defendant, Ewing.

[Endorsed]: Filed this 6th day of February, A. D. 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Saturday, the 6th day of February, A. D. 1904. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Number and Title of Case.]

Order Denying Motion for a New Trial.

* * * * * * * * *

Mr. McGowan thereupon led a motion for a new trial. Said motion was thereupon submitted to the Court for decision without argument. After due consideration had thereon, it is by the Court ordered that said motion be, and the same is hereby, denied.

* * * * * * * * *

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Saturday, the 6th day of February, A. D. 1904. Present: The Honorable JOHN J. DE HAVEN, Judge.

THE UNITED STATES OF AMERICA,
vs.
WILLIAM BAER EWING, et al. } No. 4065.

Convicted of using the mails to further a scheme to defraud. Sec. 5480, R. S., U. S., as amended by Act of March 2, 1889.

Judgment on Verdict of Guilty as to Defendant Ewing.

Benjamin L. McKinley, Assistant United States Attorney, the defendant William Baer Ewing, and his counsel, Frank McGowan, came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 31st day of December, 1902, charging him with using the mails to further a scheme to defraud; of his arraignment and plea of not guilty; of his trial, and the verdict of the jury on the 3d day of February, 1904, to wit: "We, the jury, find W. B. Ewing, the prisoner at the bar, guilty as charged."

The defendant, Ewing, was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment:

That whereas, the said William Baer Ewing, having been duly convicted in this court of using the mails to further a scheme to defraud—

It is therefore ordered, adjudged and decreed that the said William Baer Ewing be, and he is hereby, sentenced to pay a fine of five hundred (500) dollars, and to be imprisoned for the term of fifteen (15) months. And it is further ordered that said sentence of imprisonment be executed upon the said William Baer Ewing by imprisonment in the State Prison of the State of California, at San Quentin, Marin County, California.

JOHN J. DE HAVEN,

United States District Judge, Northern District of California.

[Endorsed]: Filed Feb'y 6th, 1904. Geo. E. Morse, Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM BAER EWING and GEORGE B. CHANEY,
Defendants.

Order Fixing Time of Defendant William Baer Ewing to Prepare, Serve and File Bill of Exceptions Upon Motion for Arrest of Judgment.

Good cause appearing therefor, the said defendant, William Baer Ewing, is hereby allowed fifteen days from the date hereof in which to prepare, and serve a bill of exceptions upon his motion for arrest of judgment.

Dated, February 6th, 1904.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Feb. 6, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM BAER EWING and GEORGE B. CHANEY,
Defendants.

Order Fixing Time of Defendant William Baer Ewing to Prepare, Serve and File Bill of Exceptions Upon Motion for New Trial.

Good cause appearing therefor, the said defendant, William Baer Ewing, is hereby allowed fifteen days from the date hereof in which to prepare and serve a bill of exceptions upon his motion for a new trial herein.

Dated, February 6th, 1904.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Feb. 6, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,
vs.
WILLIAM BAER EWING and GEORGE B. CHANEY,
Defendants.
No. 4065.

Stipulation Extending Time to File Bill of Exceptions.

It is hereby stipulated and agreed that defendant, William Baer Ewing shall have ten days further time from and after the date hereof in which to prepare, serve and file his bill of exceptions herein.

Dated San Francisco, Cal., February 12, 1904.

MARSHALL B. WOODWORTH,
United States Attorney.

[Endorsed]: Filed Feb. 12, 1904. Geo. E. Morse, Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,

vs.

WILLIAM BAER EWING and GEORGE B. CHANEY,

Defendants.

No. 4065.

Order Extending Time to Prepare, Serve and File Bill of Exceptions.

Good cause appearing therefor, it is hereby ordered that defendant, William Baer Ewing, have, and he is hereby, granted ten days further time from and after the date hereof in which to prepare, serve and file his bill of exceptions herein.

Dated, San Francisco, Cal., February 12, 1904.

JOHN J. DE HAVEN,
United States District Judge.

[Endorsed]: Filed February 12th, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,
vs.
WILLIAM BAER EWING and GEORGE B. CHANEY,
Defendants.
No. 4065.

Petition for and Order Allowing Writ of Error.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, in and for the Northern District of California:

The petition of William Baer Ewing respectfully shows, that on the 6th day of February, A. D. 1904, the said District Court rendered its judgment herein against your petitioner, sentencing the defendant, William Baer Ewing, to pay a fine of five hundred dollars, and to be imprisoned for the term of fifteen months in the State Prison of the State of California, at San Quentin, Marin County, California.

That the said United States of America is plaintiff herein, and the said William Baer Ewing and George B. Chaney are the defendants.

That the said judgment is final; that your petitioner, William Baer Ewing, claims a writ of error herein against said judgment, and upon the following grounds, viz.:

First.—That the said District Court committed manifest error in said action in overruling, disallowing, and denying the said defendant's written objections to the indictment in said action, which said ruling is to the great detriment, injury and prejudice of your petitioner, William Baer Ewing, and in violation of the rights conferred upon him by law.

Second.—That the said District Court committed manifest error in denying, refusing and overruling defendant's motion for a new trial. Which ruling is to the great detriment, injury and prejudice of your petitioner, and in violation of the rights conferred upon him by law.

Third.—That the said District Court committed manifest error in denying, refusing and overruling the defendant, William Baer Ewing's, motion in arrest of judgment. Which ruling is to the great detriment, injury and prejudice of your petitioner, and in violation of the rights conferred upon him by law.

Fourth.—That the said District Court committed manifest error in sentencing defendant, William Baer Ewing, to pay a fine of five hundred dollars, and to be imprisoned for the term of fifteen months in the State Prison of the State of California at San Quentin, Marin County, California, which judgment is to the great detriment, injury and prejudice of your petitioner, and contrary to and in violation of the right conferred upon him by law.

All of which errors above enumerated appear affirmatively from the record and proceedings herein, to

which reference is hereby made; that said errors are to the great damage of your petitioner; and he therefore prays that he be allowed a writ of error herein, and such other process as will enable him to obtain a review of the case and a correction of said errors by the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner will ever pray, etc.

WILLIAM BAER EWING,
Petitioner.

FRANK McGOWAN,
BERT SCHLESINGER,
Attorneys for Petitioner.

Upon the foregoing petition it appears that the writ of error therein prayed for of right ought to issue.

It is therefore ordered that said writ of error be, and the same hereby is, allowed, and the petitioner is ordered to furnish upon said writ a bond for costs and damages in the penal sum of two hundred dollars, and conditioned as prescribed by law.

Dated February 16th, 1904.

JOHN J. DE HAVEN,
Judge of the District Court of the United States, Northern District of California.

Service of the within by receipt of a copy is hereby admitted the 16th day of February, 1904.

MARSHALL B. WOODWORTH,
United States Attorney.

[Endorsed]: Filed February 16th, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

WILLIAM BAER EWING,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.
No. 4065.

Assignment of Errors.

Now comes the defendant, William Baer Ewing, the plaintiff in error herein, by Frank McGowan and Bert Schlesinger, his attorneys, and specifies the following as the errors upon which he will rely and will urge upon his writ of error in the above-entitled action, viz:

First.—That the District Court committed manifest error in said action in overruling, disallowing, and denying the said defendant's written objections to the indictment in said action, which said ruling is to the great detriment, injury and prejudice of the defendant, William Baer Ewing, and in violation of the rights conferred upon him by law.

Second.—That the said District Court committed manifest error in denying, refusing and overruling defendant's motion for a new trial. Which ruling is to the great detriment, injury and prejudice of your petitioner, and in violation of the rights conferred upon him by law.

Third.—That the said District Court committed

manifest error in denying, refusing and overruling the defendant's motion in arrest of judgment. Which ruling is to the great detriment, injury and prejudice of defendant, and in violation of the rights conferred upon him by law.

Fourth.—That the said District Court committed manifest error in sentencing defendant, William Baer Ewing, to pay a fine of five hundred dollars, and to be imprisoned for the term of fifteen months in the State Prison of the State of California, at San Quentin, Marin County, California, which judgment is to the great detriment, injury and prejudice of your petitioner, and contrary to and in violation of the rights conferred upon him by law.

Whereas, by the law of the land said judgment ought to have been given for said William Baer Ewing, plaintiff in error; and the said plaintiff in error prays the judgment to be reversed, annulled, and altogether held for naught, and that he be restored to all things which he hath lost by reason of the said judgment.

FRANK McGOWAN.
BERT SCHLESINGER.
Attorneys for William Baer Ewing, Plaintiff in Error.

Received a copy of the within the 16th day of February, A. D. 1904.

MARSHALL B. WOODWORTH,
United States Attorney.

[Endorsed]: Filed February 16th, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,

vs.

WILLIAM BAER EWING and GEORGE B. CHANEY,

Defendants.

No. 4065.

Bill of Exceptions.

Be it remembered, that this case came on regularly for trial on the first day of February, A. D. 1904, before said District Court and a jury impaneled to try the same.

Benjamin L. McKinley, Esq., Assistant United States Attorney, appearing for the United States, and Frank McGowan, Esq., appearing as attorney for defendant, William Baer Ewing.

That immediately after the impanelment of the jury as aforesaid, the said defendant, William Baer Ewing, objected among other grounds to the introduction of any evidence in said cause, for the reason and upon the ground, that said indictment does not state or contain facts sufficient to constitute a public offense.

That the Court overruled said objection, to which defendant then and there duly excepted.

The Government thereupon introduced evidence, oral and documentary, tending to prove all of the allegations contained in the indictment, and after argument of respective counsel, the Court delivered the charge to

the jury, and the said action was thereupon submitted to the jury for determination, and after deliberating, the jury returned a verdict against said defendant, William Baer Ewing, finding him guilty as charged; that to said verdict the defendant, William Baer Ewing, then and there duly excepted.

Thereupon the defendant moved the Court to vacate, annul and set aside the verdict of the jury heretofore rendered against said defendant, and to grant him a new trial and a rehearing of said cause, upon the ground, among others:

"That the indictment in this cause does not state facts sufficient to constitute a public offense."

Said motion was thereupon denied.

That the said defendant, William Baer Ewing, then filed a motion in arrest of judgment, which motion was and is in the words following, to wit:

"*In the District Court of the United States, in and for the Northern District of California.*

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM BAER EWING and GEORGE B. CHANEY, Defendants.

"And now comes the defendant, William Baer Ewing, and before the passing of sentence or judgment herein, moves to arrest judgment in this case, and that no

judgment be rendered herein upon the verdict of guilty against this defendant, upon the grounds:

1st.

"That the first count of the indictment does not contain or state facts sufficient to constitute a public offense in this:

"(a) It does not appear from said count or from said indictment by whom 'the said William Baer Ewing should be held out,' or by whom 'he was held out to be secretary and treasurer of said Standard Oil Promotion and Investment Company.'

"(b) That there is no allegation in said count to show or aver that the said Charles F. Dosch relied on or believed in any of the representations alleged in said count in giving to said defendants the said sum of five hundred dollars mentioned therein.

"(c) That there is no allegation in said count to show or aver that the said Mary Hanson, named therein, relied on or believed in any of the representations alleged in said count in giving to defendants the said sum of five hundred dollars mentioned therein.

"(d) That there is no allegation in said count to show or aver that Annie Guthrie, named therein, relied on or believed in any of the representations alleged in said count in giving to said defendants the said sum of four hundred dollars mentioned therein.

"(e) That there is a failure to allege in said count an essential element of the alleged offense, to wit, the said count does not allege, state or aver that there was,

at any of the time or times named or designated in said count, an or any intent upon the part of the defendants, or either of them, to use the mails of the United States Government to defraud, or to further, carry out or promote the alleged fraudulent scheme or any unlawful, illegal or any intent or purpose whatever.

"(f) That there is no allegation in said count to show that the representations or statements, or either of them, alleged to have been represented and stated in said count by said defendants were represented or stated with an intent to deceive, mislead or defraud the persons named, to wit: Charles Dosch, Mary Hanson and Annie Guthrie, or that said representations were made with an illegal or unlawful or any intent to use the mails of the United States Government.

"(g) That there is no allegation in said count to show or aver at any of the time or times mentioned therein there was an intent on the part of said defendants, or either of them, to defraud any person through or by the agency of the mails of the United States Government, or that any matter or thing alleged or set forth in said count was done or represented by defendants, or either of them, with any such, or any intent whatever.

"(h) That there is no allegation in said count to show or aver that the defendants, or either of them, intended to effect the scheme mentioned and described therein by opening or intending to open correspondence with the persons named in said count, or with other persons to the Grand Jury unknown.

"(i) It is not directly alleged in said count, nor does it appear therein, or therefrom, that the alleged scheme to defraud included or contemplated a use or abuse of the mails of the postoffice establishment of the United States.

"(j) The said first count of said indictment is defective in that it does not allege any intent upon the part of defendants, or either of them, to use or employ said United States mails as a part of said alleged fraudulent scheme.

"(k) The said first count in said indictment is defective in this—it is not alleged or charged therein that it was a part of the alleged fraudulent scheme that it should be effected by opening or inciting to correspondence by means of the postal establishment of the United States."

2d.

"That the second count in said indictment does not contain or state facts sufficient to constitute a public offense in this:

"(a) It does not appear from said count by whom the said George B. Chaney should be held out, or by whom he was held out, as vice-president, or by whom the said William Baer Ewing should be held out, or by whom he was held out, to be the secretary and treasurer of the Standard Oil Promotion and Investment Company.

"(b) There is no allegation in said count that either of said defendants ever falsely or otherwise represented to any person or persons any of the matters or things

set forth on page ten of said indictment between lines 4 and 26 thereof.

"(c) That there is no allegation in said count that any of the matters and things alleged and set forth as represented by said defendants were known to be, or were believed to be, false or untrue by said Charles F. Dosch, Mary Hanson and Annie Guthrie, or that either of the persons last named did not know the same to be false and untrue.

"(d) That there is no allegation in said second count to show or aver that Charles F. Dosch, Mary Hanson and Annie Guthrie, or either of them, relied upon or believed in any of the alleged representations or assertions alleged in the said second count as represented by said defendants in giving the said several sums of money alleged to have been given by said persons last named.

"(e) There is a failure to allege in said count an essential element of the alleged offense, to wit, the said count does not allege, state or aver that there was at any of the time or times named or designated in said count an or any intention upon the part of defendants, or either of them, to use the mails or the United States Government to defraud, or to further, carry out or promote the alleged fraudulent scheme or any unlawful, illegal, or any intent or purpose whatever.

"(f) There is no allegation in said count to show that the representations and statements, or either of them, alleged to have been represented and stated in said count by said defendants, were represented or

stated with an intent to deceive, mislead or defraud the persons named, to wit: Charles Dosch, Mary Hanson and Annie Guthrie, or that said representations were made with an illegal or unlawful or any intent to use the mails of the United States Government.

"(g) There is no allegation in said count to show or aver that at any of the time or times mentioned therein there was an intent on the part of the said defendants, or either of them, to defraud any person through or by the agency of the mails of the United States Government, or that any matter or thing alleged or set forth in said count was done or represented by defendants, or either of them, with any such, or any intent whatever.

"(h) That there is no allegation in said count to show or aver that the defendants or either of them intended to effect the scheme mentioned and described therein by opening or intending to open correspondence with the persons named in said count, or with other persons to the Grand Jury unknown.

"(i) It is not directly alleged in said count, nor does it appear therein or therefrom that the alleged scheme to defraud included or contemplated a use or abuse of the mails of the postoffice establishment of the United States.

"(j) The said second count of said indictment is defective in that it does not allege any intent upon the part of defendants, or either of them, to use or employ said United States mails as a part of said alleged scheme to defraud.

"(k) The said second count of said indictment is defective in this: It is not alleged or charged therein that it was a part of the alleged scheme to defraud that it should be effected by opening or inciting to correspondence by means of the postal establishment of the United States."

3d.

"That the third count of said indictment does not state or allege facts sufficient to constitute a public offense in this:

"(a) That there is no allegation in said count to show by whom defendant Chaney and defendant Ewing, should be held out, or by whom they were ever held out to be represented respectively vice-president, and secretary and treasurer, of the said Standard Oil Promotion and Investment Company.

"(b) It does not appear from said third count by whom it should be selected, claimed or represented that the said Standard Oil Promotion and Investment Company has an authorized capital stock of $5,000,000.00.

"(c) There is no allegation in said count to show that Charles F. Dosch, Mary Hanson and Annie Guthrie did not know that the alleged representations were untrue or false.

"(d) There is no allegation in said count to show or aver that Charles F. Dosch, Mary Hanson and Annie Guthrie believed in or relied upon any of the representations set forth in said count in giving to defendants or said Standard Oil Promotion and Investment Com-

pany the various sums of money mentioned therein, or at any time or at all.

"(e) There is a failure to allege in said count an essential element of the alleged offense, to wit: The said count does not allege, state or aver that there was at any time or times named or designated in said count an or any intent upon the part of the defendants, or either of them, to use the mails of the United States Government to defraud, or to further, carry out or promote the alleged fraudulent scheme, or any unlawful, illegal or any intent or purpose whatever.

"(f) There is no allegation in said count to show that the representations and statements, or either of them, alleged to have been represented and stated in said count by said defendants were represented or stated with an intent to deceive, mislead or defraud the persons named, to wit: Charles F. Dosch, Mary Hanson and Annie Guthrie, or that the said representations were made with an illegal or unlawful or any intent to use the mails of the United States Government.

"(g) There is no allegation in said count to show or aver that at any of the time or times mentioned therein there was an intent on the part of said defendants, or either of them, to defraud any person through or by the agency of the mails of the United States Government, or that any matter or thing alleged or set forth in said count was done or represented by defendants, or either of them, with any such or any intent whatever.

"(h) There is no allegation in said count to show or aver that the defendants, or either of them, intended

to effect the scheme mentioned and described therein by opening or intending to open correspondence with the persons named in said count, or with any other persons to the Grand Jury unknown.

"(i) It is not directly alleged in said *court*, nor does it appear therein or therefrom, that the alleged scheme to defraud included or contemplated a use or abuse of the mails or the postoffice establishment of the United States.

"(j) The said third count of said indictment is defective in this, that it is not alleged or charged therein that it was a part of the alleged scheme to defraud that it should be effected by opening or inciting to correspondence by means of the postal establishment of the United States.

"(Signed) FRANK McGOWAN,

"Attorney for Defendant, William Baer Ewing.

"[Endorsed]: Filed this 6th day of February, A. D. 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk."

That after argument the said court denied the said motion in arrest of judgment, to which ruling the said defendant, William Baer Ewing, then and there duly excepted.

That the said court thereupon pronounced its judgment, wherein and whereby it sentenced the said defendant, William Baer Ewing, to pay a fine of five hundred dollars, and to be imprisoned for the term of fifteen months, and that the sentence of imprison-

ment be executed upon the said William Baer Ewing by imprisonment in the State Prison of the State of California, at San Quentin, Marin County, California.

That to said judgment, the said defendant then and there duly excepted.

The foregoing bill of exceptions is hereby on the 4th day of March, A. D. 1904, settled, allowed and certified to be correct. And I do further certify that defendant William Baer Ewing's bill of exceptions was after due notice to the counsel representing the United States, presented to me for settlement on the 2d day of March, A. D. 1904.

Dated March 4th, 1904.

JOHN J. DE HAVEN,
United States District Judge.

Due service of the within proposed bill of exceptions is hereby admitted the 16th day of February, 1904.

MARSHALL B. WOODWORTH,
United States Attorney.

[Endorsed]: Filed Mar. 4, 1904. Geo. E. Morse, Clerk.

In the District Court of the United States, in and for the Northern District of California.

THE UNITED STATES OF AMERICA,

vs.

WILLIAM BAER EWING and GEORGE B. CHANEY,

Defendants.

No. 4065.

Order Granting Supersedeas and Admitting to Bail.

A writ of error having been allowed in the above-entitled action, it is, upon motion made in behalf of the defendant, W. B. Ewing, ordered that a supersedeas upon the judgment in said writ mentioned be, and the same is hereby, granted; and it is further ordered that pending the determination of the said writ of error the thereinnamed William Baer Ewing be, and he is hereby, admitted to bail in the sum of six thousand dollars, the sureties to justify before the clerk of the District Court of the United States, for the Northern District of California, upon notice to the United States Attorney for said District; and upon furnishing said bail, it is ordered that the said William Baer Ewing be released and discharged from imprisonment on said judgment.

Dated February 16th, A. D. 1904.

JOHN J. DE HAVEN,
United States District Judge.

Received a copy of the within the 16th day of February, A. D. 1904.

MARSHALL B. WOODWORTH,
United States Attorney.

[Endorsed]: Filed Feb. 16, 1904. Geo. E. Morse, Clerk.

THE AETNA INDEMNITY COMPANY,
Hartford, Conn.

In the District Court of the United States, for the Northern District of California

THE UNITED STATES OF AMERICA,
vs.
WILLIAM BAER EWING and GEORGE B. CHANEY,
Defendants.
No. 4065.

Bond on Writ of Error.

Know all men by these presents, that we, William Baer Ewing, as principal, and the Aetna Indemnity Company of Hartford, Connecticut, as surety, are held and firmly bound unto the United States of America, in the full and just sum of two hundred ($200.00) dollars, gold coin of the United States, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of February, A. D. 1904.

Whereas, lately, at a session of the District Court of the United States, in and for the Northern District of California, in a criminal action pending in said Court, and entitled, "United States of America vs. William Baer Ewing and George B. Chaney, No. 4065," a final judgment was rendered against the said William Baer Ewing, and the said William Baer Ewing having obtained a writ of error and lodged a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid action, and a citation directed to the United States, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit on the 15th day of March, A. D. 1904.

Now, the condition of the above obligation is such that if the said William Baer Ewing shall prosecute said writ of error to effect, and answer all costs and damages, if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this 17th day of February, A. D. 1904.

WM. BAER EWING. [Seal]

THE AETNA INDEMNITY COMPANY, of Hartford, Connecticut,

By JUDSON C. BRUSIE,
Attorney in Fact.

[Seal] Attest: W. A. POWNING,
Assistant Secretary.

Subscribed and acknowledged before me this 17th day of Feby., 1904.

[Seal] GEO. E. MORSE,

Clerk U. S. District Court, Northern District of California.

Approved Feb. 23, 1904.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Feb. 17, 1904. Geo. E. Morse, Clerk.

Writ of Error (Copy).

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, defendant in error, a manifest error hath happened, to the great damage of the said William Baer Ewing, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 15th day of March next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 16th day of February, in the year of our Lord one thousand nine hundred and four (1904).

[Seal] GEORGE E. MORSE,
Clerk of the United States District Court, Northern District of California.

Allowed by:

JOHN J. DE HAVEN,
United States District Judge, Northern District of California.

[Endorsed]: Lodged in the clerk's office of the District Court of the United States, Nrn. Dist. of California, for the Deft. in Error, this 16th day of Febr'y, A. D. 1904. Geo. E. Morse, Clerk.

Clerk's Certificate to Transcript.

United States of America,
Northern District of California. } ss.

I, George E. Morse, clerk of the District Court of the United States for the Northern District of California, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of sixty-nine (69) pages, numbered consecutively from 1 to 69, inclusive, is a true and complete transcript of the records, proceedings, pleadings, orders, judgment and other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said Court, made up pursuant to praecipe filed by the plaintiff in error; and I further certify and return that I have annexed to said transcript, and include within said paging the original citation, writ of error, and proof of service thereof.

I further certify that a copy of the writ of error was lodged in my office for defendant in error on the date of the issuance of the writ of error.

I further certify that the cost of said record, amounting to thirty-six dollars and fifty cents ($36.50) has been paid by plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at San Francisco, in the Northern District of California, this 14th day of March, A. D. one thousand nine hundred and four, and of the In-

dependence of the United States the one hundred and twenty-eighth.

[Seal] GEO. E. MORSE,
Clerk.

[Endorsed]: No. 1048. United States Circuit Court of Appeals for the Ninth Circuit. William Baer Ewing, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Northern District of California.

Filed March 14, 1904.

F. D. MONCKTON,
Clerk.

No. 1048.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FRANK MCGOWAN,
BERT SCHLESINGER,
Attorneys for Plaintiff in Error.

Pernau Press.

No. 1048.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from a judgment of conviction rendered in the District Court of the Northern District of California on the 6th of February, 1904. The only question involved is as to the sufficiency of the indictment. The plaintiff in error moved for a new trial and in arrest of judgment, both of which motions were denied.

The indictment charges that on the 31st day of December, 1900, the plaintiff in error devised a scheme to defraud

certain persons mentioned in the indictment, which said scheme to defraud "*was to be effected by opening correspondence and communication with such persons and by distributing advertisements and letters by means of the postoffice establishment of the United States*".

The indictment then sets out a number of representations which it is alleged were false, and that in reliance upon them the persons whose names are mentioned in the indictment were induced to and did give to the plaintiff in error, and his associates, certain sums of money.

It is further alleged that in furtherance of the scheme to defraud a letter was placed in the mails, &c.

POINTS AND AUTHORITIES.

THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO CHARGE THAT THE ALLEGED FRAUDULENT SCHEME ORIGINALLY EMBRACED THE DESIGN AND PURPOSE TO USE THE MAILS.

The averment of the indictment, with respect to the postoffice establishment, is as follows:

> "*Which said scheme to defraud* was to be effected by opening correspondence and communication with such persons, and by distributing advertisements, circulars, prospectuses and letters *by means of the postoffice establishment of the United States.*"

The essentials of an indictment of this character are pointed out in Stokes v. United States, 157 U. S. 187:

> "(1.) That the persons charged must have devised a scheme or artifice to defraud; (2) that they must have intended to effect this scheme by opening or in-

> tending to open correspondence with some other person through the postoffice establishment, or by inciting such other person to open communication with them; (3) and that in carrying out such scheme, such person must have either deposited a letter or packet in the postoffice, or taken or received one therefrom."

There is no averment in the indictment that the plaintiff in error *intended* to effect the scheme through the postoffice establishment.

In United States v. Harris, 68 Fed. Rep. 347, Judge Ross said:

> "One of the constituent elements of the offense denounced by the statute, upon which the indictment in this case is based, is the intended use of the United States mail in aid or furtherance of the fraudulent scheme. It is therefore essential that the indictment charge directly, and not inferentially or *by way of recital,* that the scheme included the *intended use of the mail.*"

In United States v. Long, 68 Fed. Rep. 348, the indictment alleged that the defendant, "having devised a " scheme to defraud one J. W. Strickler, to be effected by " opening correspondence and communication with said " Strickler by means of the postoffice establishment of the " United States," and the Court said:

> "This averment seems to be more in the nature of a recital than a positive allegation, and therefore according to the authorities is at least open to criticism. Assuming, however, without deciding that this defect is one of form and not fatal, the more serious objection remains that the indictment fails to allege that it was *defendant's intention,* as a part of his *fraudulent scheme,* to open correspondence through the mail. * * * The averment, assuming it positive and direct,

> that the fraudulent scheme was 'to be effected by opening correspondence by means of the postoffice establishment', is merely a designation of the instrumentality by which the scheme was, in point of fact, to be accomplished, and, unaided by implication or inference, certainly *falls far short* of charging that the defendant, as a part of his *fraudulent scheme, designed its accomplishment through the instrumentality named.*''

And in speaking of the indictment in Stokes v. United States, the learned Judge says:

> ''In the case of Stokes v. U. S., supra, the indictment, which was held to be sufficient, alleged as follows:
>
> '' 'That the postoffice establishment of the United States was to be used for the purpose of executing such scheme and artifice to defraud as aforesaid, pursuant to said conspiracy, &c.'
>
> '' This, it will be observed, is an averment, not only that the postoffice establishment was to be used in executing the fraudulent scheme, but, furthermore, that such use was a part of the scheme, or, in the phraseology of the indictment was '*pursuant to said conspiracy*'. The allegation, however, of the indictment in the present case, is *simply that the fraudulent scheme was to be effected by the use of the postal establishment,* without any averment that such *use* was *designed* as a *part* of the *scheme.*' ''

In United States v. Smith, 45 Fed. Rep. 563, it is said:

> ''But the charge, though couched in the language of the statute, must be made directly, not left to inference, nor stated by way of recital. Herein the pleading is defective. It is not charged directly that the *scheme embraced* the *design* to *use the mails* for its accomplishment, and the statement, as made, is merely by way of recital.''

In United States v. Clark, 121 Fed. Rep. 191, the Court said:

> "To make out an offense, therefore, under the statute, this must be both charged and proved. It is not sufficient that the mails were *actually* used, although that is one ingredient. The scheme must involve their *use* to *effectuate* the fraudulent purpose, the use in fact being merely the overt act. The present indictment is defective in this respect."

In the following cases will be found appropriate averments of this essential of the statute.

In Stewart v. United States, 119 Fed. Rep. 91, the allegation was:

> "By means of the postoffice establishment of the United States which *said use and misuse of the* postoffice establishment of the United States was a *part of said scheme and artifice to defraud.*"

In O'Hara v. United States, 129 Fed. Rep. 553 (C. C. A.) the allegation was:

> "By means of the postoffice establishment of the United States *which said misuse of the postoffice establishment of the United States* was then and there *a part of said scheme and artifice to defraud.*"

The indictment in the case at bar nowhere avers that the defendants' scheme embraced a design to use or misuse the postoffice establishment. It does not appear that the defendants made the postoffice establishment an essential part of their scheme. The scheme is set forth in detail commencing with the words, "That on the 31st day of December, 1900, the said William Baer Ewing and George B. Chaney devised," (see bottom of page 6, tr.) and ending

with the words "correspond with them" (see page 11 tr.) and not a word will be found with respect to the use of the postoffice department. There is absolutely no averment that the use of the postoffice establishment was designed as a part of the scheme.

THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO NEGATIVE THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE.

It is an established principle of law that the indictment should negative by specific and distinct averment such material pretenses as the prosecution expects to prove false, so that the defendant may be given notice of what he is to defend against; and these averments of falsity should be as specific and distinct as in an assignment of perjury.

The representations set out in the indictment are that the plaintiff in error and his co-defendant represented to the persons mentioned therein that the Standard Oil Promotion and Investment Company had an authorized capital of $5,000,000 and a subscribed capital of $2,500,000; that it had funds on deposit in the First National Bank, in the Western National Bank and in the Germania Trust Company; that said company was licensed by the United States Government and that the company was organized for the purpose of promoting generally the oil industry of the Pacific Coast; that the said Standard Oil Promotion and Investment Company would finance incorporated oil companies of from $100,000 to $5,000,000 capitalization and put them on a paying basis.

That the said Standard Oil Promotion and Investment Company was transacting and would transact a co-operative investment business in oil stocks and properties, and would give to investors of limited means the same opportunities enjoyed by the "Kings of Finance" and "Market Leaders"; that said investors were receiving and would receive pro rata shares of the profits of said investments every thirty days, as the said profits were or thereafter should be earned; that a complete statement, together with a check for all profits earned, would be sent to all investors at the end of each month; that the only charge that would be made by said Standard Oil Promotion and Investment Company would be twenty per cent of the profits of the said investors on their said investments; that the said defendants should represent that they had made a life-long study of oil throughout the United States; that their judgment based on years of experience would earn thousands of dollars for those who should follow their advice in all matters pertaining to oil; that the said Standard Oil Promotion and Investment Company was investigating and would invest only in first-class stocks and properties; that the said Standard Oil Promotion and Investment Company had been and was represented in every oil producing district of California and Texas; that the money invested by the investors was and would be at times safe; that the said investors could withdraw the entire amount of their investment after ninety days, together with all profits, by giving thirty days notice in writing to the said Standard Oil Promotion and Investment Company.

The indictment further alleges that all of said represen-

tations were made to Charles F. Dosch, Mary Hanson and Annie Guthrie, for the purpose of inducing them to give to the defendants certain property, goods and money.

The allegation of falsity is as follows:

"And said representations * * * and each and all "of them, was and were utterly false and untrue in fact, "and said representations and each and all of them, "was and were well known by the said William Baer "Ewing and George B. Chaney to be utterly false and un- "true in fact, at the time they were so made as aforesaid; "and said representations were made solely for the pur- "pose of obtaining money, goods and property of the said "persons whom they might induce to enter into corre- "spondence with them" (Tr. p. 11).

This is not an allegation that the pretenses were false in fact. It is a mere statement of a conclusion of law.

In State v. Peacock, 31 Missouri, 415, this precise question was presented, and the Court said:

> "It is not sufficient to charge that the defendant falsely pretended, &c. setting forth the means used, and then to aver that by means of such false pretenses he obtained the property, but such of the pretenses as the pleader intends or expects to prove on the trial were used, and were false; he must, as in an assignment of perjury, falsify by specific and distinct averments (3 Chitty, Cr. L. 999; People v. Stone, 9 Wend. 191; 2 M. & S. 279)."

In Commonwealth v. Morrill, 8 Cush. (Mass.) 571, the Court said:

> "The false pretense being correctly set forth and accompanied with all the proper allegations, and the

verdict being a general one, finding the defendant guilty upon the whole indictment, the motion in arrest cannot prevail, if it be found that there is a want of an allegation amounting to a direct negative, as to the value of the watch as represented. The more important representation, one more properly the subject of an indictment, if knowingly and designedly falsely stated, and one upon which a man of ordinary prudence might act, is directly negatived.''

In State v. De Lay, 93 Missouri, the Court said:

'' The indictment was otherwise faulty in that it failed by special and distinct averment to falsify the pretenses charged.''

In State v. Long, 103 Ind. Rep. 484, the Court said:

'' Nor was such proof admissible to establish the insolvent or generally bad financial condition of the appellee, since the indictment did not negative the appellee's alleged representations that he was solvent and able to pay all his debts.''

This precise question is decided in United States v. Pettus, 84 Fed. Rep. 791. The Court said:

'' The opinion of the Court of Appeals in the case of Gabrielsky v. State, 13 Tex. App. 428, very satisfactorily collects the authorities upon this subject, and states that it was well settled in common law, by all the authorities, that it was insufficient to merely negative and declare to be false, the oath of the defendant, *without stating the truth in regard to the fact. It is not sufficient that you shall say that the defendant swore falsely, but you must aver the truth as it appears in the facts, so that its falsity may appear, and he may know wherein the falsity lies.* Says the Court in that case:

' It is a constitutional right of the defendant to be informed by the indictment, in plain and intelligible

words, of the nature of the charge against him, and with that degree of reasonable certainty which will enable him to prepare his defense. He should be told in the indictment wherein, and to what extent, the statements alleged to have been made by him were false that he may know certainly what he is called upon to answer.' ''

The authorities seem to uniformly hold that a general allegation that the representations were false is not sufficient. The indictment should proceed by particular averments to negative that which is false, contradicting in express terms the matter alleged to have been falsely represented. In addition to an averment that the representations were false the indictment should also set forth the truth in regard to the matter at issue. The following is the usual form of averment: ''Whereas in truth and in fact (setting out the truth).''

THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO ALLEGE THAT THERE WAS INTENT UPON THE PART OF THE PLAINTIFF IN ERROR TO DEFRAUD ANY ONE.

The indictment does not contain any averment that any of the acts of the defendant were with the intention to injure or defraud the persons whose names are mentioned therein. If the representations of the plaintiff in error, although false in fact, were not made with fraudulent intent, then there is lacking an essential element of the crime here charged, and the conviction should not be allowed to stand. As the intent to injure and defraud is an essential element of the crime the failure to aver the intent is a fatal defect.

In United States v. Bernard, 84 Fed. Rep. 636, the Court said:

> "In the third count of the indictment against Bernard and others, there is no averment of any intent *to convert the moneys to defendants' own use.* It can only stand, therefore, upon the procuring of money by false representation; and in such a count it is necessary that the particular false statement should be pointed out. In this respect the third count in that indictment is, in my judgment, defective."

It seems to be very clear that the offense under this section is not complete without intended gain to the accused.

In United States v. Beach, 71 Fed. Rep. 161, the Court said:

> " There is, therefore, in the offense defined in the statute the element of loss to the person deceived, and also the element of gain to the offender * * * . We have discovered that the schemes and artifices named in the act are of the kind which are gainful to the wrongdoer, and thereupon we must declare that no scheme or artifice which lacks this intent can be within the prohibition of the act."

These points were urged on the motion in arrest and were overruled. If tenable they go to the very substance of the indictment and render that pleading fatally defective.

Respectfully submitted,

FRANK MCGOWAN,
BERT SCHLESINGER,
Attorneys for Plaintiff in Error.

No. 1048

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BAER EWING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error.

BENJ. L. McKINLEY,
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THE JAMES H. BARRY CO.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 1048.

BRIEF OF DEFENDANT IN ERROR.

As stated by counsel for plaintiff in error in their brief, this is an appeal from a judgment of conviction rendered in the District Court of the United States for the Northern District of California on February 6, 1904.

The questions raised by plaintiff in error relate solely to the sufficiency of the indictment, and we shall consider them briefly in the order in which they are discussed in the brief of counsel.

At the very outset, it will be observed that no demurrer or motion to quash the indictment was interposed on behalf of plaintiff in error, the defendant in the

lower Court. The Transcript of Record shows (p. 39) that on January 14, 1903, plaintiff in error entered a plea of not guilty to the indictment, and thereafter (p. 62, Tr. of Rec.) on February 1, 1904, a jury was impaneled to try the cause. It further appears that after the jury had been impaneled, and without any previous objections having been made, the objections found on pages 40 to 47, inclusive, of the Transcript of Record, were interposed and overruled by the Court. Thereafter, as appears on pages 62 and 63 of the Transcript of Record, the Government introduced evidence tending to prove all of the allegations contained in the indictment, and the jury returned a verdict finding the defendant guilty as charged. The verdict is found on page 48, Transcript of Record.

The first point urged on behalf of plaintiff in error is found at page 2 of counsel's brief, and is to the effect that the indictment is fatally defective, as it fails to charge that the alleged fraudulent scheme originally embraced the design and purpose to use the mails.

Let us briefly examine the allegations of the indictment in this particular. The indictment consists of three counts, differing only in the dates and the substance of the letters alleged to have been deposited in the United States mail in furtherance of the scheme to defraud. At page 6 of the Transcript of Record occur the following allegations, omitting the preliminary

allegation: "William Baer Ewing and George B. "Chaney * * * on the 31st day of December, in "the year of our Lord one thousand nine hundred, at "the City and County of San Francisco, in the State "and Northern District of California, then and there "being, did then and there devise a scheme to defraud "* * * and certain other persons whose names are "to the Grand Jurors aforesaid unknown * * * "which said scheme to defraud was to be effected by "opening correspondence and communication with "such persons, and by distributing advertisements, cir- "culars, prospectuses and letters by means of the Post- "office establishment of the United States, and by incit- "ing such persons to open a correspondence through "such Postoffice establishment, with them, the said "William Baer Ewing and George B. Chaney, con- "cerning said scheme, and which said scheme was then "and there as follows, to-wit":

Counsel quote the case of *Stokes* vs. *U. S.*, 157 U. S., 187, as authority for the proposition that an indictment for this offense must charge, among other things, that the persons accused intended to effect the scheme to defraud, which has been devised by them, by opening or intending to open correspondence with some other person through the Postoffice establishment or by inciting such other person to open communication with them. Counsel seem to complain that the word "intended" is

not used in the indictment with reference to the use of the Postoffice establishment.

The cases of *U. S.* vs. *Harris,* 68 Fed., 347, and *U. S.* vs. *Long,* 68 Fed., 348, are cited on pages 3 and 4 of counsel's brief for the purpose of showing that an indictment must charge directly, and not by way of recital, that the scheme included the intended use of the mail.

We respectfully submit that the cases cited in no way tend to show that the indictment in the case at bar is defective in this particular, for the reason that the language of the indictment itself shows that this charge *is* made directly and certainly, and not by way of recital. The cases cited in which indictments were held bad, all relate to indictments wherein the language as to the intended use of the mails is widely different from the language of the present indictment. In the Harris case, the indictment is not set forth in the opinion of the Court and is therefore not available for comparison.

In the Long case, the allegation was "that Benedict "Long * * * having devised a scheme to defraud "one * * * to be effected by opening correspond- "ence and communication with said * * * by "means of the Postoffice establishment of the United "States, in the furtherance and execution of said "scheme, did knowingly, wilfully, unlawfuly and fe- "loniously place and cause to be placed in the Post-

"office of the United States * * * a certain "letter," etc.

In the case of *United States* vs. *Smith,* 45 Fed., 561, cited by counsel on page 4 of their brief, the allegation of the indictment was, that the defendant "having there- "tofore devised, as aforesaid, the aforesaid scheme to "defraud, to be effected by opening correspondence "with said * * * and said other persons by means "of the Postoffice establishment of the United States, "and by inciting the said * * * and said other "persons to open communication with him," did in and for executing said scheme and in attempting so to do deposit, etc.

In the case of *U. S.* vs. *Clark,* 121 Fed., 190, the language of the indictment is not set forth in the opinion of the Court, but a reading of the opinion would indicate that its averments were very different to those of the present indictment. That case holds, as shown both by the syllabus and the opinion, that an indictment for this offense must show that the scheme was "to be effected" through the medium of the mails as an essential part.

The above cases are the only ones cited by counsel in their attempt to show that this indictment is defective in the particular mentioned. A careful comparison of the language of the indictments in the cases cited in the brief of counsel, and the indictment in the case at bar will show that they are widely and essentially different.

The present indictment charges that the plaintiff in error and his co-defendant "*did then and there devise* a "scheme to defraud * * * which said scheme to "defraud *was to be effected by opening correspondence* "*and communication with such persons, and by dis-* "*tributing advertisements, circulars, prospectuses and* "*letters by means of the Postoffice establishment of the* "*United States, and by inciting such persons to open a* "*correspondence through such Postoffice establishment,* "*with them, the said * * * concerning said scheme.*"

Applying the rule laid down in the Stokes case, we find in this indictment a charge (1) that the persons charged devised a scheme to defraud, and (2) that they intended to effect this scheme by opening and intending to open correspondence with other persons through the Postoffice establishment, and by inciting such other persons to open communication with them. The third essential for such an indictment pointed out in the Stokes case, namely, the deposit of a letter in the Postoffice in carrying out the scheme, is set out in another portion of the indictment.

That this indictment comes squarely within the rule laid down in the Stokes case, there can be no doubt. There is a plain, clear, direct, unmistakable charge that these defendants *did then and there devise a scheme to defraud;* it is then charged in direct and certain terms that *said scheme to defraud was to be effected by opening correspondence * * * by means of the Post-*

*office establishment of the United States, and by inciting such persons to open a correspondence through such Postoffice establishment with them * * * concerning the scheme.*

Nothing is here left to inference; each allegation is plain and there can be no doubt in the mind of any reasonable man that the language of the indictment contains a plain charge that the fraudulent scheme embraced a contemplated use of the mails. Plaintiff in error is charged with devising a scheme to defraud, which said scheme to defraud was to be effected as above set forth. *When* was said scheme to defraud, to be *effected by opening correspondence,* etc.? From the language of the indictment, *at the time* the plaintiff in error and his co-defendant *did then and there devise it.*

In this connection, we call the attention of the Court to the case of *U. S.* vs. *Hoeflinger,* 33 Fed., 469, wherein the indictment contained the following averment: "Said scheme and artifice to be effected by opening "correspondence * * * with * * * said "unknown persons by means of the Postoffice establish- "ment of the United States." The learned Judge in that case held this indictment good on demurrer. The averments in the one at bar are more direct than in that case and surely this indictment should be held good after plea and verdict.

We also call attention to the case of *Weeber* vs. *U. S.,* 62 Fed., 740, decided by Mr. Justice Brewer of the

United States Supreme Court, sitting as Circuit Justice. The indictment is not set out in *haec verba* in the opinion, but the Court says on page 741: "The indictment "before us charges a scheme to defraud, to be effected "by means of a correspondence through the Postoffice "establishment, and that in executing such scheme the "defendant placed a letter in the Postoffice, and subse- "quently received it therefrom." The Court on appeal from a judgment of conviction held the indictment sufficient.

These observations will, we think, effectually dispose of the first contention of counsel.

We come now to the second, namely, that the indictment is fatally defective, as it fails to negative the representations alleged to have been made.

In beginning a discussion of this point, we may observe that in our judgment, no such question has been raised by the Assignment of Errors (pp. 60 and 61, Tr. of Rec.). The Assignment of Errors refers specifically to these documents: (1) the defendant's written objections to the introduction of evidence, which are found on pages 40 to 47, inclusive, of the Transcript of Record; (2) the motion for a new trial, which appears on pages 49 and 50 of the Transcript of Record, and (3) the motion and arrest of judgment, which appears on pages 63 to 71, inclusive, of the Transcript of Record. After a careful examination of these documents referred to in the assignment of errors, we respectfully

submit that we have been unable to discover that this point has been raised at all in such a manner that the Court can take notice of it here. Subdivision 4, Rule 24, of this Court, is applicable in such a case.

But aside from this consideration, we believe that the indictment fulfills all the requirements of the statute, and in any event, after verdict is entirely sufficient. Counsel begins the discussion of this point (brief, page 6), by stating that "it is an established principle of "law that the indictment should negative by specific "and distinct averments such material pretenses as the "prosecution expects to prove false, so that the defend- "ant may be given notice of what he is to defend "against; and these averments of falsity should be as "specific and distinct as an assignment of perjury." They do not quote a single case wherein a charge was made under the statute applicable to the case at bar, which sustains their contention.

The Missouri and Massachusetts cases cited at pages 8 and 9 were all cases arising under peculiar local statutes. The Peacock case was a prosecution for obtaining by false pretenses the signature of a party to an instrument of writing, and all of the others, with the exception of the case of the *U. S.* vs. *Pettus,* were cases wherein the charge was obtaining money or property by false pretenses. Counsel say, with great confidence, that "this precise question was presented" in the Peacock case and in the Petus case, whereas close examination of

those cases will disclose the fact that the precise point was not decided at all. The indictment in the Peacock case is not set out in the opinion of the Court, but an examination of the opinion shows that the allegations discussed by the Court are in nowise similar to the allegations of the indictment at bar. The case of *U. S.* vs. *Pettus,* 84 Fed., 791, was a charge of perjury under Section 5392, R. S., which is a totally different charge to the one at the case at bar.

It may be safely asserted, that not a single case can be found in the United States Reports which holds that an indictment for the offense herein charged, which is framed as this indictment is, is defective in the particular contended for by counsel. No such case has been cited, and it is safe to say that none exists.

In this connection, we respectfully call the attention of the Court to the case of *U. S.* vs. *Bernard et al.,* 84 Fed., 634. At page 636, occurs the following language: "In some of the indictments, the second count, "while alleging the intent to convert any moneys sent "them to the defendants' own use, does not allege the "falsity of any specified statements contained in the letters or circulars quoted and alleged to have been sent "by mail. I do not think this is necessary where the "count explicitly charges, as the second counts charge "that the money was sought for the ostensible purpose "of investment in business for the sender's account, but

"with the real intent to convert the moneys to the de-
"fendants' own use."

The whole opinion in this case is instructive upon this, and upon the next point urged by counsel at page 10 of their brief, namely, that the indictment is fatally defective, as it fails to allege that there was intent upon the part of the plaintiff in error to defraud anyone.

The case above referred to is cited by counsel for plaintiff in error in support of their third objecetion, but the language above set out is not quoted. The doctrine enunciated by that case is, briefly stated, that a scheme is as much "a scheme to defraud" under Section 5480, R. S., which has for its object the obtaining of money for investment in a regular business enterprise by means of false representations, as is one which has for its object the conversion of the money obtained to the use of the defendants. In the indictment at bar, on pages 10 and 11, of the Transcript of Record, occur the following allegations:

"And it was further devised by and between the said
"William Baer Ewing and * * * that each and
"all of the said representations aforesaid, should be
"made and they were so made to the said * * *
"and that said scheme should be entered into and car-
"ried out, and it was so entered into and carried out
"by the said William Baer Ewing and * * *
"with the intent and for the purpose of inducing the

"persons aforesaid * * * and any other persons "who might be induced to enter into correspondence "with the said William Baer Ewing and * * * "to give to them, the said * * * certain property, "goods and money of the various persons aforesaid, and "each of them, and of the other persons who might be "induced to enter into corrspondence with the said "* * * * * * * * * * * and said represen- "tations so made as aforesaid, and each and all of them, "was and were utterly false and untrue in fact, and said "representations, and each and all of them, was and "were well known by the said William Baer Ewing "and * * * to be utterly false and untrue in fact, "at the time they were so made as aforesaid; *and said "representations were made solely for the purpose of "obtaining money, goods and property of the said per- "sons whom they might induce to enter into corre- "spondence with them.*"

Thereafter, on page 11 and at the top of page 12 of the Transcript of Record, appear allegations to the effect that the parties therein named were induced to give and did give to the plaintiff in error and his co-defendant certain moneys, by reason of the false representation made by them.

We believe that these allegations of the indictment sufficiently show that the third point raised by plaintiff in error is untenable.

We have now, we believe, fully disposed of the va-

rious points raised on behalf of plaintiff in error, and we respectfully submit that for the reasons stated not one of them is tenable.

We submit that the judgment of the District Court should be affirmed.

Respectfully,

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MARSHALL B. WOODWORTH,

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Of Counsel.

No. 1048.

IN THE

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FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
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vs.

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PETITION FOR REHEARING.

FRANK MCGOWAN,
BERT SCHLESINGER,
Attorneys for Petitioner.

Pernau Press.

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vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING.

The attorneys for plaintiff in error, after carefully considering the opinion of this Honorable Court heretofore rendered and filed herein, think that with propriety they may ask this Court to consider whether this case be one in which it will be proper to grant a rehearing, and they respectfully petition your Honorable Court to grant a rehearing in this case for the reasons and upon the ground:

The principal contention is that the indictment does not directly allege that the use of the Post Office establishment was a part of the scheme. We concede that it appears inferentially from the indictment, but such does not satisfy the statute. On this point we believe that the Court has misapprehended the rule of United States v. Long, 68 Fed. Reporter, for the cases show that the rule of the long case is in harmony with the decisions that have passed on the question. The Long case practically decides that an indictment under Section 5480 alleging that the defendant devised a fraudulent scheme, "to be effected by opening correspondence " by means of the Post Office establishment", though following the language, is defective as failing to directly allege that defendant, as a part of the fraudulent scheme, designed its accomplishment through the instrumentality of the Post Office.

In United States v. Harris, 68 Fed. Reporter, it was held that an indictment under Section 5480 must *directly* allege that the fraudulent scheme itself included the intended use of the United States mail in its execution.

In United States v. Smith, 45 Fed. Reporter 462, the indictment reads:

> "Having devised, as aforesaid, the aforesaid scheme to defraud to be effected by opening correspondence * * * by means of the Post Office establishment of the United States * * * and in and for executing said scheme * * * deposited in the United States Post Office."

In that case it was held,

> "it is not charged directly that the scheme embraced the design to use the mails for its accomplishment, and the statement is made merely by way of recital. 'The purpose of the law is to prohibit mail facilities in aid of fraudulent schemes. It is not clear why the design to use the mails was required as a constituent element of the offense. Thereby the statute measurably defeats its purpose, since the mail may be used in aid of fraudulent purposes if the intent so to do was not part of the scheme to defraud."

Taking Stokes v. United States to establish the rule for the essential averments in an indictment of this kind this pleading, we respectfully submit, does not conform to the following: (2) "That they " must have intended to effect this scheme by open- " ing or intending to open correspondence with " some other person through the Post Office estab- " lishment", because "said scheme to defraud was " to be effected", is only the opinion of the pleader. By whom it was to effected is left to inference. There is no allegation of the intended use, and, therefore, this requirement of the Stokes case has not been complied with. To allege that a scheme to defraud was devised, and following it by a mere recital that it was to be effected by certain means are not the equivalent of the allegation of the indictment in the Stokes case. In the latter it was alleged the Post Office was to be used for the purpose of exe-

cuting such scheme, etc., and "pursuant to said conspiracy".

The misuse of the Post Office establishment is an essential part of the offense. Without it no crime has been committed under the statute. Being an essential feature, according to all rules of pleadings, it must be directly alleged. It cannot be left to inference nor doubtful allegation, nor do mere opinions of the pleaders satisfy the law.

The specific points against this indictment are:

1st. That it does not allege that the use of the United States mail was a part of the scheme to defraud.

2nd. That the use of the mails was not contemplated at the time the scheme was originated.

3rd. That it is not alleged by whom it was to be effected, nor is there anything in the indictment other than the mere opinion of the pleader to show that the use of the mail was ever contemplated in the scheme to defraud, or any logical connection between these two conditions.

It seems that the Court held in effect that the objections urged against the indictment in this case were sufficient within the rule of United States v. Long, but endeavored to distinguish that case from the cases cited in the opinion. With all due respect to the Court we submit that Culp v. United States, 82 Fed. 990, Hume v. United States, 118 Fed. 689, O'Hara v. United States, 129 Fed. 553,

Kellogg v. United States, 126 Fed. 323; and Durland v. United States, 161 U. S. 306, do not sustain the position of the Court expressed in the opinion for the very evident reason that the question involved in this indictment was not before the Court for consideration in the cases just cited. In Culp v. United States, *supra,* there was not involved the sufficiency of the indictment, nor was a similar question presented for consideration. So far as the record discloses, as we understand that case, the sole question before the Court at that time was whether or not the Act of March 2nd, 1889 (25 Stat. 873) repealed Section 5480 of the Revised Statues, or narrowed its scope to the schemes and artifices specified, for the Court therein declared:

> "Now we cannot assent to the proposition pressed upon us by counsel for the plaintiff in error that the Act of 1889 was intended to curtail the operation of the original enactment. No such limitation, we think, was contemplated or effected by the amendatory Act of 1889."

And in Hume v. United States, *supra,* the questions were, first, whether or not letters should be set out in the indictment. Second, the necessity for an allegation of mailing. Third, the date of the offense; and, Fourth, an allegation as to the time of the offense. These seem to be all the questions that were involved in that case, for the Court states:

"The scheme to defraud is well alleged", which seems not to have been disputed in the case.

In Kellogg v. United States, *supra,* it is directly that he "had devised a scheme and artifice to de- " fraud by inducing", etc. (see page 324), and " said scheme and artifice was to be effected by " opening correspondence.

In O'Hara v. United States the indictment contained the following:

> "Which said misuse of the Post Office establishment of the United States was then and there a part of said scheme and artifice to defraud" (page 552).

In Durland v. United States, 161 U. S. 314, it appears that

> "it is contended that the indictment should either recite the letter, or at least by direct statement show their purpose and character and that the names and addresses of the parties to whom the letters were sent should also be stated. It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud, but still, we think that as it stands it must be held to be sufficient."

A mere passing analysis of these different cases will, we believe, show that they are distinguishable from the case at bar, and that the questions involved there were not the precise questions to be determined in this case.

Dalton v. United States, 127 Fed. Rep. 544
(a prosecution under Sec. 4480),

is subsequent to any authority referred to by the learned Court in its opinion. It was not cited in brief of counsel. Circuit Judge Jenkins, in delivering the opinion of the Court of Appeals, quotes approvingly from Pettibone v. United States, 148 U. S. 197, as follows:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, *if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.* The charge must be made directly, and not inferentially or by way of recital. United States v. Hess, 124 U. S. 483, 486 (8 Sup. Ct. 571, 31 L. Ed. 516). And in United States v. Britton, 108 U. S. 199 (2 Sup. Ct. 531, 27 L. Ed. 698), it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

And the Court says:

> "Every particular of the scheme must be directly and positively averred."

It is respectfully submitted that a rehearing should be granted.

FRANK MCGOWAN,
BERT SCHLESINGER,
Attorneys for Petitioner.

We hereby certify that in our judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

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